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**DoD Compliance With The National Environmental Policy Act:
Should NEPA Apply To DoD Major Federal Actions Overseas?**

By
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Thomas Joseph Couture

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“Defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns.”

Secretary of Defense Dick Cheney¹

I. INTRODUCTION

As the turbulent decade of the 1960's drew to a close, Congress, obviously concerned over degradation of the environment² and, aware of a national demand for environmental leadership, and its previous failure to provide it,³ formulated and enacted a comprehensive national environmental policy known as the National Environmental Policy Act of 1969⁴ (NEPA).

NEPA, hailed by some as an “Environmental Bill of Rights,”⁵ was a landmark piece of legislation that, perhaps for the first time, emphasized the newfound significance that lawmakers had placed on cleaning up and protecting the environment. Simply stated, NEPA requires all agencies of the Federal Government, “in cooperation with State and

¹ Secretary of Defense, Richard Cheney, Address to Defense and Environmental Initiative Forum, Washington D. C. (3 September 1990).

² National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 (1994) [hereinafter NEPA].

³ L. SIGAL AND J.W. WEBB, THE PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT : ITS PURPOSE AND USE, THE ENVIRONMENTAL PROFESSIONAL VOLUME 11, pages 14-24 at 15. (1989).

⁴ NEPA, *supra* note 2, §§ 4332 (1994).

⁵ Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 269 (1970).

local governments, and other concerned public and private organizations,”⁶ to prepare a “recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment[.]. . .”⁷. Some consider the passage of NEPA as the entry of federal facilities into the “environmental age.”⁸

The Department of Defense (DoD) is one of the federal agencies affected by the enactment of NEPA. DoD has taken affirmative steps to implement NEPA, as it applies to environmental effects of major DoD actions *within* the United States, in its regulations.⁹ In regards to military activities outside the United States¹⁰ however, DoD contends that Executive Order 12,114, and not NEPA, applies to its actions.

In recent times, the unresolved question of what NEPA obligations DoD faces with respect to the potential environmental effects of its major actions *abroad*, has been a bitterly contested issue. Critics of DoD’s posture argue that Congress intended NEPA to be applicable world-wide and have vigorously sought to use the courts to force a NEPA

⁶ 42 U.S.C. § 4331(a).

⁷ 42 U.S.C. § 4332(2)(c).

⁸ L. Hourcle, Federal Facilities Law 450, George Washington University, Spring 1997, February 15, 1997, pp1-8. (“Prior to the enactment of NEPA, federal agency environmental law was little more than a patchwork of programs related to federal land use.”)

⁹ 32 C.F.R. Ch. I, pt. 188.1 (emphasis added).

¹⁰ 32 C.F.R. Ch. I, pt. 187.1 provides guidance to DoD employees on department requirements and responsibilities with respect to DoD actions that do significant harm to places outside of the United States.

change that would impose its requirements for all overseas military actions.¹¹ To date these critics have been relatively unsuccessful in pushing their agenda, but it is clear that their battle is far from over.¹²

This note asserts that, except in certain circumstances,¹³ NEPA does not, and should not, apply to DoD military activities abroad, and further that proposed actions to amend NEPA or Executive Order 12,114 to mandate DoD overseas compliance are unnecessary. This view is not to be misconstrued as purporting to relieve DoD of its environmental responsibilities for military actions outside the United States. On the contrary, this note articulates the belief that changes to NEPA are unnecessary for two primary reasons:

First, DoD, through a proactive reexamination of its past environmental practices, has committed itself to being an environmental leader with respect to military operations, both during war and while supporting United Nations peacekeeping missions.¹⁴ Therefore, actions to amend NEPA are redundant and fail to consider the necessary flexibility that is required in order for DoD to perform its military mission and which is afforded through Executive Order 12,114 and department directives.

¹¹ See B. Breen, *International Application of NEPA*, 806 A.L.I.-A.B.A. 421, 423-425 (1992).

¹² See A. Smith, *The Extraterritorial Application of the National Environmental Policy Act: Formulating A Reliable Test for Applying NEPA to Federal Agency Actions Abroad*, 34 NAT. RESOURCES J. 751 (1994); and G. Burghelea, *The Extraterritorial Application of AntiTrust Law and the National Environmental Policy Act: A Comparative Study*, 8 GEO. INT'L ENVTL. L. REV. 351 (1996).

¹³ Arguably, NEPA might apply for some military actions when those activities occur in the global commons, which are defined as geographical areas that are outside the jurisdiction of any nation, and includes the oceans outside territorial limits and Antarctica. See *Massey* discussion, *infra*, Section V.D.

¹⁴ See Operation Joint Endeavor discussion, *infra*, Section VIII A. 2.

Second, in this age of global economy, a renewed emphasis on proposing world-wide unilateral application of an American environmental statute ignores the traditional rules of sovereignty as well as the complexities of numerous international environmental issues which exist today.¹⁵ Arguably, protection of the environment will be better served, not by projecting a United States environmental statute on a foreign sovereign, which actually could be viewed as degrading the environmental progress DoD has begun to achieve world-wide, but rather by utilization of both existing and future bilateral and multilateral environmental agreements.¹⁶

This note examines and emphasizes the myriad of ways DoD protects the environment while conducting military operations abroad. This protection is being accomplished through a cultural emphasis on environmental awareness as well as through implementation of new regulations, guidelines, policies and practices.¹⁷ Part II will provide a broad examination of NEPA, its history, a review of the issue of extraterritorial application of its principles, an assessment of its possible application to DoD activities overseas, and recent attempts to amend its application. Part III examines the question of foreign sovereignty inherent in any argument supporting the extraterritorial application of a domestic statute, the customary international law obligations that United States military forces must comply with while deployed to a foreign sovereign, and two seminal American cases dealing with the extraterritorial application of U.S. statutes overseas.

This section also illustrates the potential problems with the application of NEPA overseas

¹⁵ See B. Maragia, *Defining The Jurisdictional Reach of NEPA: An Analysis of the Extraterritorial Application of NEPA in Environmental Defense Fund, Inc., v. Massey*, 4 WIDENER J. PUB. L. 129, 180 (1994).

¹⁶ See Possible Alternatives to NEPA Unilateral Application discussion, *infra*, Section III D. 3.

¹⁷ See detailed discussion, Sections VII and VIII, *infra*.

and provides possible alternative solutions to its application.

Part IV explores Executive Order 12,114 and how it determines DoD's ability to protect the environment abroad. It also explains how DoD has implemented this order within its agency. Part V focuses on the most relevant court cases which have interpreted NEPA's extraterritorial application. Part VI highlights the history of Presidential Review Directive 23, its proposed changes to NEPA, and the possible ramifications of those changes on DoD overseas operations. Part VII updates current DoD directives and policies currently in effect which provide a baseline for all current DoD environmental compliance procedures.

Part VIII of this note examines recent DoD environmental actions which provide meaningful new insight into how DoD has evolved into an organization which proactively *Seeks* to consider the delicate balance between protecting global environmental standards while accomplishing its primary mission of defending United States national and foreign policy interests. This note concludes with Part IX which provides a brief summary of proposed recommendations that would foster environmental protection overseas without requiring the need for unilateral application of NEPA.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

A. History

NEPA has been in existence since 1970. In enacting what is recognized as the nation's basic environmental charter,¹⁸ Congress' stated purpose was to:

¹⁸ 40 C.F.R. §1500.1(a) (1991). ("NEPA is our basic national charter for protection of the environment.")

“[D]eclare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”¹⁹

Due to this sweeping language, NEPA, the most broadly applied of all the major environmental statutes, has been referred to as the “cornerstone” of modern American environmental law and has demonstrably changed the environmental face of the earth.²⁰

Congress’ broad mandate to protect the environment was examined and restated in *Weinberger v. Catholic Action of America* where the Supreme Court noted that NEPA has two distinct goals: “. . . to inject environmental considerations into the federal agency’s decision-making process by requiring the agency to prepare an environmental impact statement (EIS). . . [and] to inform the public that the agency has considered environmental concerns in its decision making process.”²¹

NEPA satisfies these goals by imposing a continuing responsibility on our federal government to “use all practicable means to improve and coordinate Federal plans, functions, programs, and resources necessary to ‘assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.’”²²

¹⁹ 42 U.S.C. §4321.

²⁰ M. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 Envtl. L. 447, 447-54 (1990).

²¹ *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981).

²² 42 U.S.C. §4331 (b)(2).

Unlike other United States environmental laws,²³ NEPA contains no substantive requirements and is essentially procedural in nature.²⁴ To realize its intended result, Congress inserted several “action-enforcing” procedures into NEPA.²⁵ Courts have interpreted these “action forcing” requirements as imposing non-discretionary duties upon federal decision makers which are then judicially enforceable.²⁶ These procedures require that “to the fullest extent possible. . . all agencies of the federal government shall include in every recommendation or report or proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement. . . on the environmental impact on the proposed [major federal] action.”²⁷

This detailed statement, known as the environmental impact statement (EIS), must include:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s

²³ Most other U.S. environmental laws contain provisions authorizing enforcement, judicial review or citizen suits. *See, e.g.*, Federal Water Pollution Control Act §509, 33 U.S.C.A. §1369 (enforcement and judicial review). *See also Id.* §505, 33 U.S.C.A. §1365 (citizen suits). Clean Air Act §§304 & 307, 42 U.S.C.A. §§7604 & 7607 and Resource Conservation and Recovery Act §§7002-7004& 7006, 42 U.S.C. §§6972-74 & 6976.

²⁴ *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 44 U.S. 223 (1980).

²⁵ S. Rep. No. 296, 91st Cong., 1st Sess. 19 (1969).

²⁶ *See*, F. ANDERSON, NEPA IN THE COURTS, A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 15-48 (1973).

²⁷ 42 U.S.C. §4332(2)(c)(i).

environment and the maintenance and enhancement of long-term productivity, and,

(v) irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.²⁸

Thus, the logic behind the EIS disclosure requirement is that the general public is made aware of the environmental considerations and concerns that have been taken into account by the responsible federal agency.²⁹

However, before starting the EIS process, the responsible federal agency must first determine whether this action is indeed necessary by preparing an environmental assessment (EA).³⁰ The purpose of an EA is to verify the need for the project, whether there are any potential environmental effects resulting from it, and whether possible alternatives to the action exist.³¹ If an EA documents that the proposed action will result in no significant environmental impact, the agency can issue a finding of no significant impact (FONSI).³² In most cases, this finding will satisfy the NEPA requirement. If the agency does determine that a major federal project will result in significant, or potentially significant, environmental impacts, an EIS must be accomplished.³³

The enactment of NEPA, Title II, also created the Council on Environmental

²⁸ 42 U.S.C. §4332(2)(c)(i)-(v).

²⁹ See Weinberger, *supra* note 21 at 143.

³⁰ 40 C.F.R. §1501.3(a).

³¹ 40 C.F.R. §1508.9.

³² 40 C.F.R. §1501.4(e), §1508.13.

³³ 40 C.F.R. §1501.4(c).

Quality (CEQ)³⁴ that functions within the office of the President and whose primary duty is to issue regulations pertaining to EIS requirements.³⁵ CEQ is also responsible for accumulating and reviewing environmental studies and data; providing NEPA advice to other federal agencies; and assisting the President in formulating a national environmental policy.³⁶ Historically, CEQ's interpretation of NEPA has been granted "substantial deference" by the courts.³⁷

NEPA describes the "heart"³⁸ of the EIS as being the requirement for the agency to discuss all reasonable alternatives to the proposed action as well as the anticipated environmental consequences of these alternatives.³⁹ Thus, under NEPA, federal agencies are required to take a "hard look" at the potential impact of their agency action on the environment.⁴⁰ Failure by an agency to do so can result in the agency being held to

³⁴ 42 U.S.C. §4342.

³⁵ 40 C.F.R. pt. 1500. CEQ is also directed to assist the President in preparing an annual report to Congress on the condition of the environment, along with recommendations for improvements.

³⁶ For a detailed summary of the functions and duties of the CEQ, See NEPA, *supra* note 2, §204, 42 U.S.C. §4344.

³⁷ See, *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989).

³⁸ 40 C.F.R. §1502.14(a). ("This section [alternatives] is the heart of the environmental impact statement.") *Id.*

³⁹ 40 C.F.R. §1502.16.(a).

⁴⁰ *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983).

judicial scrutiny under the Administrative Procedures Act (APA).⁴¹

This NEPA requirement to demonstrate that alternatives to a proposed action have been thoroughly reviewed ensures that both the agency decision-maker and the public at large have all of the facts necessary to make an educated decision concerning all available options. Finally, the EIS “must include appropriate environmental mitigation measures not already included in the proposed action or alternatives.”⁴²

B. Department of Defense Environmental Practices

NEPA’s goal of environmental protection through federal agency policy action makes sense when one realizes that agencies of the federal government have historically been some of the nation’s worst polluters.⁴³ By the end of the 1980’s, the Department of Defense, one of those agencies, had more than 27,000 military facilities⁴⁴ and over 2,000,000 active duty personnel stationed around the world.⁴⁵ With responsibility for protecting American citizens, interests, and natural resources around the world, DoD is clearly one of the largest and most diverse of all the executive agencies.

⁴¹ 5 U.S.C. §701-706 (1994).

⁴² 40 C.F.R §1502.14(f) (1993).

⁴³ L. Hourcle, Federal Facilities Law 450, George Washington University, Spring 1997.

⁴⁴ *Id.*

⁴⁵ M. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When To Say “No”*. 40 A.F. L. REV. 1 citing to the DoD Selected Manpower Statistics for Fiscal Year 1994 table 2-16 (Sept 30, 1994) which listed active duty strength at 2,138,213 in 1988.

Less impressive, however, is the fact that, other than the Department of Energy,⁴⁶ no federal agency has a more deserved reputation for polluting the environment.⁴⁷ This fact, if unrealized before, became public knowledge by the late 1980's when government reports indicated that up to one quarter of the United States military bases scheduled for closure were so badly contaminated that each was included on the EPA's National Priorities List (NPL)--the national roster of hazardous waste sites that pose serious health threats to humans and the environment.⁴⁸

The scope of the environmental damage discovered at DoD installations seriously undermined and demonstrated the weaknesses in the early environmental programs DoD had implemented to recognize and emphasize environmental protection within its agency.⁴⁹

⁴⁶ Although DOE does not have the most contaminated sites, the estimated clean-up costs of DOE sites, due to the radioactive nature of its waste, is expected to far exceed the remaining federal facilities combined clean-up bill. DEPARTMENT OF ENERGY, DOE/EM-0232, ESTIMATING THE COLD WAR MORTGAGE: THE 1995 BASELINE ENVIRONMENTAL MANAGEMENT REPORT (1995).

⁴⁷ M.R. Kassen, *Inadequacies of Congressional Attempts to Legislate Federal Facility Compliance with Environmental Requirements*, 54 MD. L. REV. 1475, ("The vast majority of federal facilities that have released contamination into the environment are defense facilities, owned and operated by the Department of Defense or by the Department of Energy (DOE), the agency responsible for manufacturing and maintaining nuclear weapons.") *Id.* at FN 3.

⁴⁸ See Congressional Budget Office, Environmental Cleanup Issues Associated with Closing Military Bases 2 (1992); See also, Cleaning up Federal Facilities: Controversy over an Environmental Peace Dividend, Env't Rep. (BNA) No. 8 at d27 (Jan. 13, 1993).("DoD has 17,000 contaminated sites in its cleanup inventory.")

⁴⁹ One example of such a program is the Natural Resource Conservation Award which DoD has presented annually since 1962 to recognize military installations and Defense

While, perhaps, easy to place blame on DoD for its early unsuccessful environmental policies, a more knowledgeable understanding of the progress DoD has made can be appreciated only if one steps back and reflects upon how far the DoD environmental program has come since NEPA was enacted. Consider the comments of Mr. Gary Vest, the Principle Assistant to the Deputy Under Secretary of Defense for Environmental Security:

“In 1970, . . . [e]nvironment in the United States Department of Defense was non-existent. There was no program, there was no budget, there were no professionals, there was no body of policy. Now, 25 years later, the United States Department of Defense has in excess of a \$5 billion annual budget.⁵⁰ There is probably no environmental program in the Federal Government today that can equal that of the United States Department of Defense. It is exceptional.”⁵¹

As observed by Mr. Vest, arguably, no federal agency has as aggressively attacked the

employees who have achieved outstanding accomplishment in the conservation of natural resources DoD manages world-wide. DoD is responsible for maintaining and protecting approximately 25 million acres of land and water world-wide. Similarly, since 1973, DoD has recognized excellence in leadership and achievements in environmental quality by awarding the Environmental Quality Award to military installations and Defense employees that make significant progress in avoiding and controlling air, water, land and noise pollution. *See handout, The Secretary Of Defense, Environmental Security Awards, April 24, 1997, The Pentagon, Washington D.C.* While important in their own right, these initiatives pale in comparison to the changes DoD has recently made in its environmental policy.

⁵⁰ *See Hourcle, supra* note 8 in which the author states that for FY 98, DoD has requested \$1.264 billion to clean up active bases and \$857 million for clean up of bases scheduled for closure. These amounts do not include expenditures for environmental compliance for current DoD activities.

⁵¹ GRUNWALT, KING, AND McCLAIN, PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT, U.S. NAVAL WAR COLLEGE INTERNATIONAL WAR STUDIES, VOL. 69, CHAPTER XXII, quoting the address of Mr. Gary Vest to participants at a Naval War College Symposium (September 1995).

problems of environmental contamination at its sites across the world as has DoD. Faced with many serious environmental issues,⁵² DoD, in an era of forced troop reductions and budget cuts, has single-mindedly expended a great deal of time, energy and finite resources on environmental protection and cleanup programs.⁵³

During the early 1990's, the Department of Defense continues to stress its absolute commitment to providing environmental excellence within the permissible limits of its defense mission. In 1991, in testimony provided to the House Armed Services Committee Hearings, Mr. Thomas E. Baca, Deputy Assistant Secretary of Defense for the Environment, declared the problem of cleaning up hazardous waste sites at military facilities to be DoD's "largest challenge."⁵⁴ However, there have been some notable bumps along the way.

The challenge in successfully accomplishing DoD's goal became obvious when a General Accounting Office investigation reported in 1991 that DoD had failed to provide

⁵² Perhaps no DoD environmental issue is as serious as the on-going cleanup of the Rocky Mountain Arsenal outside Denver, Colorado where decades of environmental damage has resulted in a site that will take years to clean at an estimated cost of over \$2 billion dollars. *See, generally, Cleaning up Federal Facilities, supra* note 48 at d27 (Jan. 13, 1993).

⁵³ *Id.* ("In 1993 alone, funding for DoD environmental programs, including restoration efforts at operating and closing bases increased from \$500 million to \$2.2 billion.) *Id.* See also R. Wegman and H. Bailey, *The Challenge of Cleaning Up Military Wastes When U.S. Bases Are Closed*, 21 ECOLOGY L. Q. 865, 868 (1994), citing to Congressional Budget Office, *Cleaning Up Defense Installations: Issues and Options* 2 (1995) which estimates that overall cleanup costs in DoD will hit \$30 billion by the year 2000.

⁵⁴ DoD Env'tl. Programs: Hearings Before the Readiness Subcomm., the Env'tl Restoration Panel, and the Dep't of Energy Defense Nuclear Facilities Panel of the House Comm. On Armed Service., 102d Cong., 1st Sess. 194 (1991) [hereinafter House Armed Service's Hearings].

sufficient guidance concerning appropriate hazardous waste disposal practices at its military bases overseas.⁵⁵ Later that year, a House Armed Services Committee study similarly concluded that United States military environmental practices overseas were inconsistent with both U.S. and host nation environmental standards.⁵⁶

In light of these negative findings, Congress directed the Secretary of Defense to “develop a policy for determining applicable environmental requirements for military installations located outside the United States,” and “[i]n developing the policy, the Secretary shall ensure that the policy gives consideration to adequately protecting the health and safety of military and civilian personnel assigned to such installations.”⁵⁷

Stung by these critical reports, DoD undertook numerous actions to emphasize its commitment to environmental protection. The first, and perhaps easiest, action was the introduction of new agency environmental recognition programs designed to increase personnel awareness of DoD’s commitment to environmental excellence. Since 1994, DoD has recognized military installations and weapon system acquisition teams that demonstrate significant strides in reducing pollution at the source.⁵⁸ The proposed goal of

⁵⁵ See, Wegman & Bailey, *supra* note 53 citing to GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE MANAGEMENT PROBLEMS CONTINUES AT OVERSEAS MILITARY BASES 45 (1991), which examined the environmental operations at 10 U.S. military bases in Europe and Asia and found that these operations violated both U.S. and host nation environmental laws.

⁵⁶ See House Armed Services Hearing, *supra* note 54 at 66.

⁵⁷ See Ruppert, *supra* note 45 at 21, citing to the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §342(b)(1), 104 Stat. 1485, 1537 (1990).

⁵⁸ The Secretary Of Defense, Environmental Security Awards, April 24, 1997, The

this program is that by “utilizing improved processes, the Department is [better] able to eliminate or reduce the amount of hazardous materials used while saving raw materials, energy, water and other resources.”⁵⁹

Likewise in 1994, DoD introduced two new environmental recognition programs, the Environmental Cleanup Award and Recycling Award. The purpose of the environmental cleanup program is to “contain or remove threats to human health or the environment that have resulted from past operations on DoD lands.”⁶⁰ Similarly, the goal of the recycling program is to increase awareness that “recycling is growing in importance as a means of improving the environment and conserving natural resources” by avoiding landfill and associated costs.⁶¹

While some might argue that these awards constitute only a minor agency environmental commitment, the bigger picture reflects that these programs impact upon the larger goal of increasing employee awareness to the importance of environmental protection in day-to-day dealings within the agency. DoD understands that this first step, increasing employee environmental awareness, is important in a large and diverse agency and appreciates that, in many cases, environmental protection is achieved one employee at a time.

In addition to the creation of these new programs, in the early 1990's, DoD

Pentagon, Washington D.C. handout.

⁵⁹ *Id.*

⁶⁰ *Id.*

specifically undertook three actions to better account for and improve its environmental compliance programs at overseas locations: (1) implementation of DoD Directive 6050.16 which created a process to establish and implement specific environmental standards at overseas installations;⁶² (2) adoption of the Overseas Environmental Baseline Guidance Document (OEBGD)⁶³ to begin implementing the requirements of DoD Directive 6050.16; and (3) development of “final governing standards”⁶⁴ to be used by all overseas military installations. To the consternation of some however, DoD did not take action to implement NEPA policies to its military actions overseas. Supporters of this position however, point to this policy as nothing more than a reaffirmation of traditional customary law, or in other words, respect for a nation’s sovereignty.⁶⁵

⁶¹ *Id.*

⁶² DoD Dir. 6050.16, *DoD Policy for Establishing and Implementing Environmental Standards at Overseas Military Installations* (1991) replaced by DoD Dir. 4715.5 *Management of Environmental Compliance Overseas* (1996). (On file with the Air Force Legal Services Agency, Environmental Law and Litigation Division, Rosslyn, Virginia).

⁶³ DEPARTMENT OF DEFENSE ENVTL. OVERSEAS TASK FORCE, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (1992) [Hereinafter OEBGD]. *See* detailed discussion, *infra* Section VII. B.

⁶⁴ *Id.* at para. 1-2. (“country-specific substantive provisions, typically technical limitations on effluent, discharges, etc., or a specific management practice, with which installations must comply.”) *See* detailed discussion, *infra* Section VII.B.

⁶⁵ Customary international law traditionally has held that the actions of a foreign nation on the soil of a host nation are governed by “lex situ”, the law of the place, unless there is an agreement between the two nations as to the specific standard applicable. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §401-403 115 cmt. d (1986) [hereinafter RESTATEMENT].

C. NEPA's Application to DoD Overseas Military Operations

The Department of Defense has military and civilian personnel assigned to hundreds of foreign countries around the world. Historically, United States overseas military operations have been governed by DoD regulations, statutes, multi-lateral and bi-lateral treaties, international laws, the specific laws of the host foreign nation, and Presidential Executive Orders.⁶⁶

Since its enactment, DoD has traditionally dismissed the extraterritorial applicability of NEPA to military deployments overseas⁶⁷ relying on the long established principle of law that for a statute to apply extraterritorially, it must contain language that makes “a clear expression of Congress’ intent for extraterritorial application.”⁶⁸ As will be illustrated in Section V, United States courts have narrowly interpreted Congressional expression of intent to the point where, except in fact-specific situations, they have routinely upheld the presumption against extraterritorial application of U.S., and especially environmental, statutes.

D. Review of NEPA’s Legislative History

One need look no further than NEPA’s statutory language to see that Congress did

⁶⁶ G. Brauchler, Jr., *United States Environmental Policy and The United States Army in Western Europe*, 5 COLO. J. INT’L L. & POL’Y 479 (1994).

⁶⁷ S. DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT, Hanover: University Press of New England (1996) at 147.

⁶⁸ See discussion, *infra*, Section III C.

not clearly address how the statute was to be applied to major Federal actions abroad.⁶⁹ Likewise, a review of the legislative history seeking clarification on how Congress intended NEPA to be applied outside the United States is equally fruitless.⁷⁰ Non-deterring, critics of the DoD policy against applying NEPA to its overseas actions interpret portions of the statutory language to support their position that NEPA was intended to cover all world-wide activities.⁷¹

Specifically, proponents of a global application of NEPA interpret language found within the statute such as “harmony between man and his environment”⁷², “restoring and maintaining environmental quality to the overall welfare and development of man [,]”⁷³ and “recognizing the world-wide and long-range character of environmental problems and where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs. . . .”⁷⁴ as clear support of Congress’ intent to apply NEPA to federal agency action around the world.⁷⁵

⁶⁹ 42 U.S.C. §§4321-4370.

⁷⁰ *NRDC v. Nuclear Regulatory Comm’n*, 647 F. 2d 1345, 1367 (D.C. Circ. 1981) (“NEPA’s legislative history illuminates nothing in regard to extraterritorial application.”) See detailed discussion, *infra*, Section V. A.

⁷¹ S. Riechel, *Government Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT’L. L. 115, 122 (1994).

⁷² 42 U.S.C. §4321.

⁷³ 42 U.S.C. §4331.

⁷⁴ 42 U.S.C. §4332(f).

⁷⁵ See, Riechel, *supra* note 71 at 122; See also G. Keller, Note, *Greenpeace U.S.A. v. Stone: The Comprehensive Environmental Impact Statement and the Extraterritorial*

A complete reading of NEPA seems to support the opposite view. Consider the following legislative history language: “[t]he purpose of the bill [NEPA] as hereby reported, is to create a Council on Environmental Quality (CEQ) with a broad and individual overview of current and long-term trends in the quality of *our national environment*.⁷⁶ Similarly Section 101(a) of NEPA in explaining the phrase “man and nature can exist in productive harmony” limits the meaning of the word “man” to present and future *generations of Americans*.⁷⁷

These examples prove that statutory language can be interpreted to support a number of positions. Consider also the following language: “[t]he Congress authorizes and directs that, *to the fullest extent possible*. . . all agencies of the Federal Government *shall* [comply with the provisions of this chapter]. . . ”⁷⁸. Likewise the following language suggests the possibility that Congress understood that situations might exist which would make application of NEPA inappropriate: “[i]n order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, *consistent with other essential considerations of national policy* to improve and coordinate Federal plans, functions, programs, and resources.”⁷⁹ DoD’s position has been that “because the statute [NEPA] does not specify whether it applies to

Reach of NEPA, 14 U. HAW. L. REV. 751 (1992).

⁷⁶ 1969 U.S. CODE CONG. ADMIN NEWS 2751 (1969) (emphasis added).

⁷⁷ 42 U.S.C. §4331(a) (emphasis added).

⁷⁸ 42 U.S.C. §4332(2) (emphasis added).

⁷⁹ 42 U.S.C. §4331(b) (emphasis added).

adverse effects upon foreign environments or to actions taken outside of the United States”⁸⁰ it does not apply to major DoD overseas military activities.⁸¹

When NEPA is viewed relative to the language of other U.S. environmental statutes, DoD’s rationale is certainly defensible. For example, the Clean Air Act⁸² declares as its purpose: “to protect and enhance the quality of the *Nation’s* air resources so as to promote the public health and welfare and the productive capacity of *its population*. Likewise, the Clean Water Act’s stated primary objective is “to restore and maintain the chemical, physical, and biological integrity of the *Nation’s waters*” which are defined as “*waters of the United States.*”⁸³ Finally, CERCLA,⁸⁴ which establishes the procedures for remediation of past hazardous waste practices, requires the President to adopt a National Contingency Plan (NCP)⁸⁵ that addresses releases or threatened releases

⁸⁰ J. R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVT'L AFF. L. REV. 543, 546 (1991).

⁸¹ DoD bases its position on a 21 June 1978, DoD OGC Legal Memorandum entitled: THE APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO MAJOR FEDERAL ACTIONS WITH ENVIRONMENTAL IMPACTS OUTSIDE THE UNITED STATES 15-16 which concluded that an analysis of the NEPA legislative history provided no direct evidence of Congressional intent to apply the EIS requirement to federal actions when the impact is outside the United States.

⁸² Clean Air Act, 42 U.S.C. §7401(b) [hereinafter CAA].

⁸³ Federal Water Pollution Control Act, 33 U.S.C. §§1251(a) 1362(7) (1996). (emphasis added) [hereinafter CWA].

⁸⁴ Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601-9675 (1996) [hereinafter CERCLA].

⁸⁵ *Id.* at §9605.

of hazardous substances “*throughout the United States.*”⁸⁶

Even the CEQ, whose function is to assist the President in formulating national environmental policy,⁸⁷ has added to the confusion on the extraterritorial issue. In 1976, CEQ issued a memo which concluded that NEPA was to be interpreted broadly:

“The human environment is not limited to the United States, but includes other countries and areas outside the jurisdiction of any country (e.g., the high seas, the atmosphere). The Act contains no express or implied geographic limitation of environmental impacts to the United States or to any other area. Indeed such a limitation would be inconsistent with the plain language of NEPA, its legislative purpose, the Council’s Guidelines, and judicial precedents.”⁸⁸

However, almost immediately, under intense pressure from the Department of State,⁸⁹ CEQ reconsidered its conclusion on this issue and withdrew this memo.⁹⁰ Currently, CEQ regulations do not address, or in any way clarify, NEPA’s extraterritorial application.⁹¹

Clearly when it chooses, Congress can be quite specific in articulating how and

⁸⁶ *Id.* at §9605(a)(8)(B) (emphasis added).

⁸⁷ NEPA, *supra* note 2, §204.

⁸⁸ U.S. Council on Environmental Quality, Memorandum on the Application of the EIS Requirement of Environmental Impacts Abroad of Major Federal Actions (Sep. 24, 1976), *reprinted in* 42 Fed. Reg. 61,066, 61,068 (1977).

⁸⁹ 42 U.S.C. §4332(2)(F). (NEPA requires that any action taken under its authority to be “consistent with the foreign policy of the United States”...and [taken] in coordination with the guidance of the Secretary of State.) *Id.*

⁹⁰ See, generally, S. Sheridan, Note, *The Extraterritorial Application of NEPA under Executive Order 12,114*, 13 VAND. J. TRANSNAT'L L. 173, 201-202 (1980).

⁹¹ 40 C.F.R. §1500-17 (1995).

where an environmental statute will be applied.⁹² Therefore, it might be fair to assume that Congress was as clear as it intended to be on the issue when it enacted the NEPA legislation. Critics, on the other hand, while admitting NEPA's silence as to extraterritorial application, place the blame squarely on Congress' failure to recognize the importance of clarifying whether NEPA was intended to apply outside the United States when the legislation was passed in 1970.⁹³ This argument is unconvincing and self-serving. Congress has had ample time to amend or modify NEPA's statutory language to provide language clarification and has chosen not to do so.⁹⁴

E. Congressional Attempts to Modify or Amend NEPA

Some might question whether the goal to amend NEPA to specifically cover extraterritorial environmental impacts truly is an issue about which DoD and other federal agencies should be alarmed. Recent history suggests that support for a NEPA change, to include amending the presumption against extraterritorial application, wavers back and forth, but never completely disappears.

This is best demonstrated by reviewing fairly recent Congressional attempts to amend NEPA. Periodically, Congress entertains legislation which, if enacted, would

⁹² See, 22 U.S.C. §2151p, Section 117 of the Foreign Assistance Act ("The President, in implementing programs and projects under this part, and part X of this subchapter, shall take fully into account the impact of such programs and projects upon the environment and natural resources of *developing* countries.") (emphasis added).

⁹³ See, Riechel, *supra* note 71 at 117.

⁹⁴ See Section III, *infra*, discussion on Foreign Sovereignty and Section IV, *infra*, discussion on Executive Order 12,114 for two possible explanations on why Congress has not amended NEPA.

amend or modify the manner in which NEPA would apply to major Federal actions that occur overseas. In most cases, these changes would require the strict application of NEPA outside the United States.

In 1989, Congressman Gerry Studds (D-MA) introduced a bill titled the Office of Environmental Quality Appropriations, Authorization,⁹⁵ which would have required the CEQ to promulgate regulations intended to increase federal agency analysis of the environmental effect of its actions outside the U.S. with respect to global warming and ozone depletion. It failed to muster enough votes for passage. Similarly, another bill tendered by Congressman Studds in 1991 titled the Office of Environmental Quality Reauthorization Act,⁹⁶ which would have amended NEPA's EIS provision, also did not pass.

During the same time in the United States Senate, Senator Frank Lautenberg (D-NJ) offered a number of bills which, had they passed, would have amended NEPA's extraterritorial application and EIS requirements.⁹⁷ In 1993, during the bitter debate over the North American Free Trade Agreement (NAFTA), Congressman Major Owens (D-NY) offered legislation that would have made NEPA applicable to extraterritorial actions

⁹⁵ H.R. 1113, 101st Cong., 1st Sess. (1989).

⁹⁶ H.R. 1271, 102nd Cong., 1st Sess. (1991).

⁹⁷ See Appropriations for the Office of Environmental Quality, Authorization, S. 1089, 101st Cong., 1st Sess. (1989) and Appropriations for the Office of Environmental Quality Authorization, S. 1278, 102nd Cong., 1st Sess. (1991).

of the Federal government.⁹⁸ Congressman Owens' bill would have amended NEPA's §102 EIS provision and would have required the President to include, with every request for legislation to implement any trade agreement, a detailed statement analyzing any extraterritorial major federal action resulting from the proposed legislation.⁹⁹ This proposed legislation also failed to gather enough bi-partisan support for passage. While these proposed bills were defeated before passage, there is little indication that, given the right circumstances, Congress will not revisit this issue.¹⁰⁰

To date, there are perhaps two reasons why Congress has been reluctant to broaden the scope of NEPA as it applies to the overseas actions of federal agencies: the question of sovereignty and the issuance of Executive Order 12,114¹⁰¹ which provided federal agencies specific guidance concerning the effects of major federal actions abroad. Executive Order 12,114 will be discussed in detail in Section IV *infra*.

III. THE QUESTION OF FOREIGN SOVEREIGNTY

When discussing the issue of whether NEPA should apply the overseas activities of federal agencies, one is inevitably drawn to the central question: should the United States unilaterally impose the requirements of a domestic environmental statute on United

⁹⁸ H.R. 3219, 103d Cong., 1st Sess. (1993).

⁹⁹ *Id.*

¹⁰⁰ See T. Digan, *NEPA and the Presumption Against Extraterritorial Application: The Foreign Policy Exclusion*, 11 J. CONTEMP H. L. POL'Y 165, 192 (1994) in which the author states that the late Congressman Mike Synar (D-Okla) noted in an interview in 1994 that some members of Congress had recognized that NEPA needed to be clarified in order to successfully apply it to extraterritorial U.S. actions.

States federal agency activities which occur within the territory of a foreign sovereign and have little, if any, impact within the United States? Supporters argue that the United States as the richest and most powerful nation in the world has a global duty and obligation to unilaterally promote environmental protection anywhere in the world.¹⁰²

Critics of a U.S. approach to environmental protection through unilateral application of NEPA counter that while protection of the environment is important, there are better ways to achieve this protection without resorting to actions which could be perceived as a blatant disregard for a nation's foreign sovereignty.¹⁰³ To truly appreciate the complexities of this issue requires a review of the principles of customary international law.

A. Customary International Law

International law is a misnomer. While some commentators see international law as the law governing "the international community of states,"¹⁰⁴ skeptics contend that

¹⁰¹ Exec. Order No. 12,114, 44 Fed. Reg. 1957, (1979).

¹⁰² S. Spracker & E. Naftalin, *Applying Procedural Requirements of U.S. Environmental Laws to Foreign Ventures: A Growing Challenge to Business*, 25 INT'L LAW 1043 (1991) ("Dissatisfied with both the pace and substantive content of these regulatory efforts [outside the United States], some environmental groups have attempted to extend judicially the application of U.S. environmental standards to ventures in other countries.")

¹⁰³ See generally, S. Whitney, *Should the National Environmental Policy Act Be Extended to Major Federal Actions Significantly Affecting the Environment of Sovereign Foreign States and the Global Commons*, 1 VILL. ENVTL. L. J. 431 (1990)

¹⁰⁴ LOUIS HENKIN ET AL., INTERNATIONAL LAW 338 at xxix (2d ed. 1987).

international law is simply a “legal fiction”¹⁰⁵ “since there is no international legislature to make it, no international executive to enforce it, and no effective international judiciary¹⁰⁶ to develop it or to resolve disputes about it.”¹⁰⁷

Proponents contend that this rationalization misses the mark. To these supporters, what essentially matters about international law “is not whether the international system has legislative, judicial or executive branches, corresponding to those in a democratic society; what matters is whether international law is reflected in the policies of nations and [the] relations between [them].”¹⁰⁸ Obviously, as long as nations continue to originate and abide by laws enacted to govern the relationship between themselves and the rest of the world, there will remain an accepted body of international law.

In order to be included within the rules of international law, a nation must first exercise control and authority, otherwise known as “sovereignty,”¹⁰⁹ over a permanent

¹⁰⁵ Interview with Lt Col (s) Ronald S. McClain, 24 June 1997. Lt Col (s) McClain, a Judge Advocate General in the United States Marine Corps., has an LL.M degree with a concentration in international and environmental law from George Washington University School of Law. He has had a number of international law articles published and has previously served as an international law course instructor at the Naval War College in Newport, Rhode Island. Lt Col (s) McClain currently serves as Deputy Director of Operational Law, HQ USCENTCOM MacDill AFB Florida.

¹⁰⁶ While few in number, decisions of The International Court of Justice (ICJ) are widely respected, but are not considered precedential. See Statute of the International Court of Justice, 48 Y.B.U.N. 1052, 59 Stat. 1031, T.S. No. 933 (Art 59 provides that a decision of the ICJ “has no binding force except between the parties and in respect of that particular case.”)

¹⁰⁷ See HENKIN ET AL., *supra* note 104 at xxix.

¹⁰⁸ M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 7, AT 8 (1988).

¹⁰⁹ *Id.* Sovereignty is defined as “[t]he supreme, absolute, and uncontrollable power by

population and a territory certain.¹¹⁰ Indeed some believe that the ability of a nation to exercise jurisdiction over its population and territory is the crown jewel of sovereignty.¹¹¹ To be included under the umbrella of international law, nations must have, at least, *de facto* authority to prescribe, adjudicate, and enforce laws within their territories.¹¹²

International law, however, also works to limit a nation's ability to impose its national will beyond its territorial borders.¹¹³ As one commentator noted:

“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.”¹¹⁴

However, international treatises, in some instances, recognize the authority of a nation to enforce its laws outside its territories.¹¹⁵ This concept recognizes that, in

which any independent state is governed.” BLACK’S LAW DICTIONARY 1396 (6th ed. 1990).

¹¹⁰ See HENKIN ET AL., *supra* note 104, at 286-287.

¹¹¹ W. WRISTON, THE TWILIGHT OF SOVEREIGNTY 7 (1992). ([I]t “has always been, in part, based on the idea of territoriality,” and as such, “[t]he control of territory remains one of the most important elements of sovereignty.”) *Id.*

¹¹² HENKIN ET AL., *supra* note 104, at 286.

¹¹³ *Id.*

¹¹⁴ *Id.* (quoting *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812)).

¹¹⁵ See RESTATEMENT, *supra* note 65 at §402 (“[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have a

certain situations, one nation may be compelled by circumstances to impose its jurisdiction over another sovereign.¹¹⁶ Thus, under international law, a nation may exercise its jurisdiction and apply domestic laws extraterritorially under the following circumstances:

- (1) Conduct which takes place in whole or in part within the territory of the sovereign nation;
- (2) Activity occurring outside the sovereign nation's territory with a substantial effect within its territory;
- (3) Activities involving the sovereign's citizens, which takes place both outside and inside its territories; and,
- (4) Conduct by non-citizens occurring outside of the country by non-citizens when directed against the security of the sovereign country.¹¹⁷

However, even if a nation meets the conditions to exercise extraterritorial jurisdiction over another sovereign, this act must be deemed reasonable.¹¹⁸ Courts traditionally deem whether such imposition of jurisdiction is reasonable by balancing several factors, such as, the connection between the regulated conduct and the territory of the regulating country, the extent to which another nation has an interest in regulating the

substantial effect within its territory.”) *Id.*

¹¹⁶ For instance, in recent times, the United Nations Security Council has imposed economic sanctions on Iraq, a certain infringement on its national sovereignty, due to Iraq's numerous violations of international law. See P. Conlan, Lessons From Iraq: The Functions of Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice, 35 VA. J. INT'L L. 633, 649-50 (1995)

¹¹⁷ P. Hagen, The Extraterritorial Reach of United States Environmental Laws, International Environmental Law Conference A.L.I.-A.B.A., 1-2 (1995) (citing RESTATEMENT §402 (1987)).

¹¹⁸ *Id.* at 2.

activity, and the likelihood of conflict with the laws of the other sovereign.¹¹⁹ Any attempt to impose NEPA on United States government activities serving in a foreign land should, to some extent, be balanced against the sovereignty factors inherent within that particular nation under these basic principles. An examination of past extraterritorial application practices of U.S. statutes is helpful in understanding this sensitive issue.

B. Extraterritorial Application of U.S. Statutes: *American Banana and Foley*

American jurisprudence has long espoused a traditional theory of sovereignty based on territoriality.¹²⁰ While Federal courts recognize that Congress has the authority to enforce the laws it enacts beyond the boundaries of the United States and its territories,¹²¹ the question of whether Congress has exercised its authority to enforce its laws outside the United States is generally resolved through statutory construction.¹²² As far back as the early 1900's, American courts demonstrated a reluctance to impose extraterritorial application of U.S. laws, even if both parties were American companies. Two seminal cases, *American Banana Co. v. United Fruit Co.*¹²³ and *Foley Brothers, Inc. v. Filardo*,¹²⁴ point out the hesitancy of courts in this situation. Issues involving the

¹¹⁹ *Id.* (citing RESTATEMENT §403 (1987)).

¹²⁰ *Id.*

¹²¹ *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). See, discussion Section III. A. *infra*, Extraterritorial Application.

¹²² *Id.*

¹²³ 231 U.S. 347 (1909).

¹²⁴ 336 U.S. 281, 284 (1949).

proposed application of United States statutes abroad generally involve a review of the principles set out in these two cases.

1. American Banana Co. v. United Fruit Co.

In *American Banana*, the court dealt with the seizure of banana plantations, located in Panama,¹²⁵ owned by the American Banana Company, a multi-national American company and chief rival of the United Fruit Company, another multi-national American corporation with extensive fruit businesses in Panama,¹²⁶ by the Costa Rican government. Prior to the seizure, United Fruit had tried without success to force American Banana to sell them its operation in Panama.¹²⁷

After a brief hearing, the Costa Rican military awarded the American Banana plantations to a local farmer, who in turn sold the property to United Fruit.¹²⁸ The plaintiffs, who lost their business as a result of the alleged illegal seizure, sued in American courts asserting that the Costa Rican action violated section 7 of the Sherman Act which amounted to an unlawful monopoly.¹²⁹

Although both courts were American corporations, the Supreme Court refused to accept jurisdiction and rejected the plaintiff's argument that the Sherman Act applied to

¹²⁵ *Id.* at 354. Panama at that time was part of the United States of Columbia. After a peasant revolt led to the declaration of an independent government, Costa Rican soldiers, at the behest of UFC, entered Panama and seized the American Banana plantation. *Id.*

¹²⁶ *Id.* at 350.

¹²⁷ *Id.*

¹²⁸ *Id.* at 354-355.

¹²⁹ *Id.*

this situation by stating that to apply it would result in “an interference with the authority of another sovereign, contrary to the comity of nations.”¹³⁰ Reasoning that the “acts causing the damage were done . . . outside the jurisdiction of the United States. . .”¹³¹ the court opined that statutes must be “confined in their operation and effect to the territorial limits” of the enacting legislative body.¹³² The court concluded that, notwithstanding United Fruit’s action, to rule the foreign seizure as unlawful under U.S. antitrust laws would be paramount to interfering with Panama’s national sovereignty.¹³³

2. *Foley Brothers, Inc. v. Filardo*¹³⁴

Forty years later, the ruling in *American Banana* was revisited by the Supreme Court. The issue facing the court in *Foley* was whether a statute enacted by Congress, the Eight Hour Law¹³⁵ could be applied extraterritorially.¹³⁶ The plaintiff in *Foley* was an American cook hired to prepare meals for construction workers employed at a number of construction sites in Iran and Iraq.¹³⁷ As might be expected, from time to time, the

¹³⁰ *Id.* at 356.

¹³¹ *Id.* at 355.

¹³² *Id.* at 357.

¹³³ *Id.* at 356. Of course, this theory is interesting when noting that it was Costa Rican soldiers, not Panamanian or Colombian troops who affected the seizure. Perhaps another indication of the Court’s willingness to apply the presumption.

¹³⁴ 336 U.S. 281 (1949).

¹³⁵ 40 U.S.C. §324-325 (1940).

¹³⁶ *Foley Brothers, Inc. v. Filardo*, *supra* note 134 at 286.

¹³⁷ *Id.* at 283.

plaintiff's duty hours exceeded the eight-hour shift for which he had contracted.¹³⁸

Unhappy with this situation, plaintiff sought overtime compensation for which he would have been statutorily mandated back in the United States.¹³⁹ Upon being rebuffed by management, plaintiff sued in American court seeking the extraterritorial application of the Eight Hour Law to his situation overseas. Plaintiff's argument was initially successful and he prevailed in the New York Court of Appeals.¹⁴⁰

Upon appeal however, the Supreme Court, relying on the presumption against extraterritorial application articulated in *American Banana*,¹⁴¹ reversed the lower court decision.¹⁴² Stating that "the legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . ."¹⁴³ the court solidified the traditional presumption against extraterritorial application and embraced it as a canon of statutory construction.¹⁴⁴

¹³⁸ *Id.*

¹³⁹ 40 U.S.C. §324-325 (1940). (The Eight Hour Law provided that no employee "shall be required or permitted to work more than eight hours in any one calendar day upon such work" unless when paid for work "in excess of eight hours per day at not less than one and one-half times the basic rate of pay.")

¹⁴⁰ *Foley Brothers., Inc. v. Filardo*, *supra* note 134 at 284.

¹⁴¹ 231 U.S. 347 (1909).

¹⁴² *Foley Brothers., Inc. v. Filardo*, *supra* note 134 at 290-91.

¹⁴³ L. K. Caldwell, Environmental-Affecting Activities of Federal Agencies Abroad: Foreign Nations and Protected Global Resources (A Report to the Army Environmental Policy Institute, Paper No. 2) 3, (April 9, 1993) at 8.

¹⁴⁴ J. Turley, Legal Theory: "*When in Rome*": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 607 (1990).

3. Present Day Application of *Foley*

Thus, today, courts, when faced with interpreting an ambiguous statute, continue to follow the assumption endorsed by the *Foley* court that “Congress is primarily concerned with domestic conditions,”¹⁴⁵ when enacting a particular law, unless it expresses its intent to apply the law extraterritorially—a test that can be hard to decipher.

In order to rebut the presumption, courts require a clear expression of legislative intent, or in other words, a “plain statement of extraterritorial effect.”¹⁴⁶ To determine Congressional intent, courts review the plain language of the statute; whether the statute provides for mechanisms of overseas enforcement such as venue and investigative authority; whether Congress addressed potential conflicts with foreign laws; and the legislative history of the statute.¹⁴⁷

This is not to suggest that courts always refuse to extend U.S. laws to foreign nations.¹⁴⁸ As will discussed *infra*, in *Environmental Defense Fund v. Massey*,¹⁴⁹ the court outlined three exceptions to the rule against extraterritorial application of U.S.

¹⁴⁵ *Foley Brothers., Inc. v. Filardo, supra* note 134 at 285.

¹⁴⁶ *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 109 (1991) (citing *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

¹⁴⁷ J. R. Urrutia, *The Extraterritorial Scope of U.S. Environmental Laws: The Case of Chile*, 8 GEO. INT'L ENVTL. L. REV. 45, 49 (1995).

¹⁴⁸ See, S. Shenefield, *Thoughts on Extraterritorial Application of the United States AntiTrust Laws*, 52 FORDHAM L. REV. 351, 361 (1983). (“Over the course of the next thirty-six years, courts struggled to find ways to circumvent *American Banana*’s holding and sought to fit foreign activities into categories that would permit United States courts to find territorial jurisdiction under United States anti-trust laws.”)

¹⁴⁹ 772 F. Supp. 1296 (D.D.C. 1991), rev’d, 986 F.2d. 528 (D.C. Circ. 1993).

laws.¹⁵⁰ Simply put, these exceptions refer to situations in which Congress has clearly indicated its intent to apply the legislation extraterritorially;¹⁵¹ when a failure to apply a statute overseas would negatively affect the ability of the United States government to properly function;¹⁵² and finally, when a statute regulates decision-making which originates in the United States, but is primarily felt in foreign nations.¹⁵³ In the case of the last exception, the presumption is still held valid if important foreign policy issues are at stake.

Supporters of an amendment to NEPA seize on this last exception to argue that the *Foley* review does not and should not apply to NEPA application to federal agency actions because NEPA applies to decisions made by federal officials most often located in the United States.¹⁵⁴ This position is overly simplistic and fails to recognize or appreciate the impact that a NEPA EIS requirement would have on a foreign sovereign. While the court in *Massey* may have reasoned such an intrusion would be acceptable in a global common, such as Antarctica, it is doubtful that the intrusive nature of an EIS gathering investigation in a foreign sovereign would be consistent with either nation's foreign policy interests especially in situations where the foreign nation has already

¹⁵⁰ 986 F.2d 528, 531 (D.C. Cir. 1993).

¹⁵¹ *Id.* (citing Aramco, 499 U.S. at 255).

¹⁵² *Id.*

¹⁵³ *Id.* at 531-532.

¹⁵⁴ See Caldwell, *supra* note 143 at 8.

initiated an EIS type process.¹⁵⁵

This argument also fails to understand the difficulty in assessing exactly where DoD has made a decision, ranging from contracts issues, tactical weaponry, strategic planning and environmental protection, that might impact the environment. Obviously many decisions are made in Washington D.C., but many others are made at the various command levels and later elevated to the Pentagon. In other cases, broad policy changes are made in Washington and more specific decisions to implement the broad policy are made in the field.

Arguably, a *Foley* review normally serves the intended purpose of protecting against unintended conflicts between United States domestic laws and those of foreign nations.¹⁵⁶ However, even if the courts determine that the Congressional intent on NEPA,¹⁵⁷ would not apply it outside the United States or its territories, does not mean that steps are not taken to protect the outside the U.S. environment in other ways. In the case of DoD, executive orders, department regulations, international agreements, defense treaties and Status of Forces Agreements combine to provide a baseline of protection for both humans and the environment.

C. Status of Forces Agreements (SOFA)

As might be expected, under international law, the actions of a foreign nation

¹⁵⁵ See Brauchler, *supra* note 66 at FN 79.

¹⁵⁶ *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

(“sending state”) within the borders of a sovereign host nation is governed by host nation law unless the two nations reach an agreement otherwise.¹⁵⁸ As previously noted, the United States has thousands of troops, performing various duties, at hundreds of overseas locations around the world.¹⁵⁹ Therefore, under customary international law, the daily acts and conduct of these members are governed by either, specific host nation laws or by mutual defense agreements or treaties drafted between the host-nation and the United States.¹⁶⁰

Historically, in order to further United States military and foreign policy interests, DoD has entered into a number of Status of Forces Agreements (SOFA) with the various nations that host United States armed forces.¹⁶¹ These broad international agreements generally outline the legal obligations which govern the activities of U.S. forces in the host nation. The SOFA often details specifics such as to what percentage each nation is willing to contribute to maintain the operation of the installation as well as the substantive and procedural standards which govern any claim for damages, either

¹⁵⁸ See RESTATEMENT, *supra* note 65 at §§401-403 115 cmt. d (1987).

¹⁵⁹ The following countries and areas make available military bases or installations for use by the United States. In Europe: Belgium, Federal Republic of Germany, Greece, Iceland, Italy, The Netherlands, Portugal (Azores), Turkey, and the United Kingdom. In East Asia and the Pacific: Australia, Japan and Korea. In the Western Hemisphere: Bermuda, Canada, Cuba, Greenland (Denmark), and Panama. In the Indian Ocean: Diego Garcia (The United Kingdom). See R. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F.L. REV. 137 (1994).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* A SOFA is a bilaterally negotiated agreement between the foreign host nation and the United States concerning the presence of American troops in the foreign country.

environmental or otherwise, against the United States.¹⁶²

However, as discussed earlier, the question of sovereignty often makes negotiating these type of agreements difficult. Traditionally, the United States has been reluctant to waive any portion of its sovereignty regarding the activities of American armed forces in a host nation. This makes the notion of a unilateral application of a U.S. statute overseas doubly troublesome to many critics of the call for extraterritorial application of NEPA.

Perhaps the best known SOFA agreement is the NATO SOFA.¹⁶³ It involves most Western European nations in which the United States maintains a military presence.¹⁶⁴ The purpose of these bilateral or multinational agreements is to allow each nation to confer and agree upon the activities that United States military members will be allowed to perform in the host nation. Given the vagaries of diplomacy and sovereignty issues, this mechanism is crucial to DoD success as without an agreement from the host-nation, or in the alternative, an applicable international agreement, American military forces would be unable to accomplish their overseas mission.

The SOFA sets the stage for DoD's environmental obligations in a foreign nation. Although SOFA's are not governed by Executive Order 12,114, these agreements, allow

¹⁶² See NATO SOFA, *infra*, at Art. VIII; JAPAN SOFA, *infra*, at Art. IV.

¹⁶³ *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces*, June 19, 1951, 4 U.S.T. 1792, 194 U.N.T.S. 67 [Hereinafter NATO SOFA].

¹⁶⁴ See Erickson, *supra*, note 159. Also See BLAKER, UNITED STATES OVERSEAS BASING: AN ANATOMY OF A DILEMMA (1990).

DoD the flexibility necessary to assist the host nation in identifying ways in which to address environmental protection in a cooperative setting. This cooperative atmosphere has resulted in agreements by the United States to comply with host nation environmental standards that are equal to or greater in protection than DoD governing standards.

As an example, recent SOFA agreements have resulted in the United States agreeing to analyze overseas base construction and operations, base consolidation actions, base transfers, and troop training.¹⁶⁵ These DoD actions arguably provide for a more comprehensive environmental regime than was ever anticipated under the Executive Order and again demonstrates DoD's commitment to environmental excellence.

However, as mentioned earlier, the United States, while eager to reach accommodation with the foreign host necessary to achieve its military goal, has always been extremely reluctant about ceding any degree of its sovereignty in agreements concerning the status of its forces overseas.¹⁶⁶ An example is the NATO SOFA which does not require the United States to "obey" host nation law, but rather only obligates it to "respect the law of the receiving state."¹⁶⁷ The same U.S. obligation holds true for both

¹⁶⁵ See Brauchler, *supra*, note 66 at 486.

¹⁶⁶ R. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. LAW REV. 49, 67 (1996).

¹⁶⁷ *Id.* citing to NATO SOFA Art. II: ("[I]t is the duty of a force and its civilian component . . . to respect the law of the receiving state, and to abstain from any activity inconsistent with the spirit of the present Agreement.") *Id.*

the JAPAN SOFA¹⁶⁸ and the KOREA SOFA.¹⁶⁹

Understandably, the ambiguity surrounding the meaning of the term “respect” with regard to environmental actions taken at DoD installations has, at times, led to controversy and conflict between the host nation and the United States.¹⁷⁰ In practice however, DoD has interpreted the United States obligation to “respect” the law of the host nation as requiring avoidance of any environmental activities which could result in the degradation of the environment or result in a violation of the host nation law.¹⁷¹

This task has not been as easy as it might appear to be at first glance. Most SOFA’s were drafted prior to the passage of NEPA and before the advent of international environmental awareness that exists for many developed nations today. As one might expect of documents created in the early 1960’s, most SOFA’s contained few, if any, reference to a specific requirement for U.S. forces overseas to comply with host nation environmental laws,¹⁷² if any host nation laws even existed.

¹⁶⁸ *The Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, regarding Facilities and Areas and the Status of the United States Armed Forces in Japan*, 19 January 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248. [hereinafter JAPAN SOFA].

¹⁶⁹ *The Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and the Republic of Korea, regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea*, 9 July 1966, 17 U.S.T. 1677, 674 U.N.T.S. 163. [hereinafter KOREA SOFA].

¹⁷⁰ See Erickson, *supra*, note 159.

¹⁷¹ See Phelps, *supra* note 166 at 67.

¹⁷² AIR FORCE JUDGE ADVOCATE GENERAL’S SCHOOL INTERNATIONAL AND OPERATIONAL LAW DESKBOOK VI-6 (1995) (on file with Office of the Judge Advocate General, Air Force International and Operations Law Division, USAF/JAI, Washington D.C.).

What normally resulted was that DoD allowed overseas installation commands to decide how its bases were going to protect the health and safety of personnel residing on base, as well as the environment. True to form, different military departments used a variety of methods and approaches to achieve “environmental protection.”¹⁷³ Pragmatically, this inconsistent, and sometimes unacceptable, approach represented a serious problem for DoD in its effort to maintain uniform environmental standards prior to implementation of the OEBGD.¹⁷⁴

This problem was discovered in 1991 by the House Armed Services Committee, Environmental Restoration Panel which determined that when local host nation environmental laws were lax, DoD demonstrated little, if any, incentive to assert more stringent compliance requirements at its facilities.¹⁷⁵ Without a uniform “minimum standard” in place, individual overseas commanders were left to decide whether they would comply with less restrictive, host nation environmental laws or with the more stringent DoD standards established for stateside bases.

To little surprise, the conclusion was that commanders, faced with budgetary constraints, complied only to the minimum extent they believed necessary to protect the

¹⁷³ See Wegman & Bailey, *supra* note 53 at 937 for a detailed discussion of military environmental practices in the Philippines during the late 1980’s.

¹⁷⁴ See Section VII, *infra*, for a detailed discussion of the OEBGD.

¹⁷⁵ 1991 House Armed Service’s Hearings, *supra* note 54 at 66. This panel focused on environmental compliance procedures at U.S. bases in the Philippines and Korea. *Id.*

health and welfare of their personnel.¹⁷⁶ This inconsistent approach¹⁷⁷ to environmental management resulted in a half-hazard application of environmental protection that resulted in environmental degradation¹⁷⁸ and renewed Congressional criticism.¹⁷⁹ As will be discussed extensively in Section VII *infra*, this episode also hastened the implementation of the OEBGD.¹⁸⁰

While this discovery did not represent a DoD success story, and continues to provide fodder for supporters seeking a NEPA amendment specifically covering DoD overseas actions, DoD has learned from these past practices. With that negative experience in mind, DoD, with regards to environmental protection, has taken numerous steps to ensure that overseas military units comply with the more strict of the applicable SOFA, host nation law or OEBGD/FGS. Recent examples of this affirmation includes Article 54¹⁸¹ of the German NATO SOFA Revised Supplementary Agreement,¹⁸² which

¹⁷⁶ See Wegman & Bailey, *supra* note 53 at 937.

¹⁷⁷ 1991 House Armed Service's Hearings, *supra* note 54 at 132. The problems were really evident at U.S. installations in the Far East where host nation environmental laws were less stringent than comparable U.S. laws. In the Philippines, the Navy declared that it would require its overseas bases to conform to U.S. drinking water and hazardous waste standards, while air and waste water pollution controls would be governed by host country standards.

¹⁷⁸ *Id.* The House Armed Service's Committee Environmental Restoration Panel discovered that U.S. bases in the Far East consistently failed to meet clean water standards which were mandated for domestic stateside facilities.

¹⁷⁹ *Id.* at 66.

¹⁸⁰ OEBGD, *supra* note 63. See Section VII, B. *infra*.

¹⁸¹ *The Agreement to Amend the Agreement of 3 August 1959, as Amended by the Agreement of 21 October 1971 and 18 May 1981, to supplement the Agreement between*

requires United States forces in Germany to apply German law in assessing the environmental impact before undertaking any impending military project.¹⁸³ In addition, specific environmental provisions of the Revised Supplementary Agreement are far-reaching and will have tremendous day-to-day implications for DoD units stationed in Germany.¹⁸⁴

Among the more relevant environmental provisions include requirements for U.S. forces to ensure that only low-pollutant fuels, lubricants and additives, in accordance with German environmental regulations, are used in operation of aircraft, vessels and motor vehicles;¹⁸⁵ a requirement to ensure that German rules and regulations for the limitation of noise and exhaust gas emissions are observed to the extent that it is not excessively burdensome to do so;¹⁸⁶ and, lastly, a requirement that U.S. forces observe German

the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany. [hereinafter Revised Supplementary Agreement].

¹⁸² *Id.* Although signed at Bonn, Germany on 18 March 1993 and ratified by the Federal Republic of Germany and the Sending states of Belgium, United States, The Netherlands, Great Britain, and Canada, the agreement, to date, has not been ratified by France.

¹⁸³ *Id.* Art. 53, para 1 provides an exception to this requirement for “internal matters which have no foreseeable effect on the rights of third parties or on adjoining communities or the general public.” *Id.*

¹⁸⁴ *Id.* The Agreement will enter into force thirty days following ratification by France. *Id.* at Art. 83, para 2.

¹⁸⁵ *Id.* at Art. 54B. This article provides an exception if such use is incompatible with the technical requirements of these aircraft, vessels or motor vehicles. *Id.*

¹⁸⁶ *Id.*

regulations pertaining to the transport of hazardous materials.¹⁸⁷

Other international agreements governing military activities in European countries to which the United States had committed also limit actions which could threaten the environment. For instance, in Spain, United States military forces must conform to Spanish laws applicable to its own military with regard to hazardous waste, pollutants and toxic substances.¹⁸⁸ In Greece, where the United States military presence is treated in “guest” status, the local Greek installation commander on American bases establishes the environmental standards to which DoD forces must conform at that location.¹⁸⁹ Ideally, these standards are at least as stringent as OEBGD/FGS guidelines.

Fundamentally then, by incorporating host nation laws, (like the examples listed above,) which, often, are stricter than comparable United States environmental laws into its governing FGS, DoD improves upon its past overseas environmental protection record without the need for unilateral application of a domestic environmental statute like NEPA.¹⁹⁰ If a situation arises, like the Greece example, in which a foreign host nation

¹⁸⁷ *Id.* at Art. 57.

¹⁸⁸ Agreement on Defense Cooperation Between the United States of America and the Kingdom of Spain of December 1, 1988, Temp. Dept. of State No. 89-150. Also, see generally, D. Rodgers, *Closing Overseas Military Installations: Environmental Issues, International Agreements and Department of Defense Policy*, (1991) (unpublished LL.M thesis, George Washington University).

¹⁸⁹ *Id.* Mutual Defense Cooperation Agreement Between the Government of the United States and the Government of the Hellenic Republic, Temp. State Dept. No. 90-309.

¹⁹⁰ One practical problem in incorporating host nation environmental laws into the FGS of a particular nation is that DoD currently has no expertise in staying current with the number of host environmental laws, which are always changing; and, no control or input

environmental law is inadequate or less stringent than comparable U.S. environmental protection standards, DoD will attempt, within applicable foreign policy and national security parameters, to ensure that OEBGD/FGS guidelines are enforced. In this way, DoD takes the steps necessary to ensure that established procedures and policies designed to ensure the highest level of environmental protection consistent with completing the mission are met.

D. The Problem with United States Unilateral Application of NEPA

This article is not intended to be an indictment of NEPA or an analysis of its pitfalls or short comings. Quite the contrary, NEPA's success story stands on its own merits. Since 1970, NEPA has achieved one of the more admirable records of environmental protection of any environmental statute enacted.¹⁹¹ However, within the United States, the use of litigation to force federal agencies to comply with NEPA's "action forcing" provisions through declaratory judgments and injunctive relief is the tool that has greatly contributed to its success.

As such the unilateral application of NEPA to DoD overseas activities is potentially violative of foreign sovereignty, and disruptive to U.S. foreign policy, and as

over the enactment of host nation environmental laws. This uncertainty leads to the possibility that DoD will view FGS' as nothing more than a "temporary" guideline for environmental protection at overseas installations.

¹⁹¹ In Commemorating the twentieth anniversary of NEPA, Congressman Gerry Studds (D-MA) noted "[t]his landmark law which originated 20 years ago in this Subcommittee stands today as the most important environmental statute in the world." Office of Environmental Quality Reauthorization, 1989: Hearing on H.R. 219 Before the Subcomm. on Merchant Marine and Fisheries, 101st Cong. 2d Sess. 1 (1989).

will be discussed later, unnecessary in light of the current situation.

1. The Problem of Requiring NEPA Public Participation in Foreign Nations

The heart of NEPA is a requirement for federal agencies to prepare an EIS if a proposed major federal action will have significant effect on the surrounding environment.¹⁹² The point of this exercise is to incorporate environmental considerations in to the day-to-day thinking and planning of federal agencies.¹⁹³ If an EIS is necessary, it is often a detailed and expensive undertaking. Some experts suggest that the average cost of preparing an EIS can range up to half a million dollars and require eighteen months of operational time.¹⁹⁴ This fact makes the application of NEPA overseas an incredible burden to DoD in both time and resources.

After completing the EIS, NEPA requires the agency to provide a minimum 45-day public comment period time during which the public at large is afforded an opportunity to review and comment on the draft EIS.¹⁹⁵ Unfortunately, these public reviews are often a precursor to lengthy litigation concerning the proposed federal course of action. Within the United States these delays have been considerable and have

¹⁹² 42 U.S.C. §4332(2)(c) (1996).

¹⁹³ *Id.* at §4321 (1996).

¹⁹⁴ This expenditure comes directly out of the operational budget of the military service and not from a supplementary appropriation from Congress. *See* Brauchler, *supra* note 66 at 500.

¹⁹⁵ NEPA, *supra* note 2 at §1506.10(c).

resulted in litigation costly to both DoD and the opposing litigant.¹⁹⁶

Unlike the U.S., many nations do not have a history of allowing public participation in the activities of governing, nor do many show any inclination to initiate such public scrutiny of government actions.¹⁹⁷ Further, in some parts of the world providing public information may put U.S. personnel at risk.. Providing detailed information about U.S. practices overseas, as is done in the U.S., could be of great interest to terrorist elements such as those responsible for the bombing of the Khobar Towers in Saudi Arabia.¹⁹⁸

Imposing NEPA requirements overseas also ignores the political realities which governs the DoD mission. In many places around the world, American military forces are disliked and are the focal point for many government opposition groups. These groups oppose the United States military presence for a variety of reasons ranging from cultural differences to religious and nationalistic beliefs. Opening up internal DoD decision making processes to foreign citizens who are already inclined to interfere with

¹⁹⁶ See Brauchler, *supra* note 66 at 500.

¹⁹⁷ Sherri Wasserman Goodman, Deputy UnderSecretary of Defense (Environmental Security), Memorandum: NSC Review of the Extraterritorial Application of the National Environmental Policy Act (NEPA) (NSC-PRD-23) pt C (2) (Washington D.C. May 24, 1993).

¹⁹⁸ On June 27, 1996, terrorists opposed to the United States military presence in Saudi Arabia, detonated a truck bomb outside the perimeter fence adjacent to King Abdul Aziz Air Base in Dhahran, Saudi Arabia. The force of the blast destroyed the Khobar Towers apartment complex, home to many of the 2250 American service personnel assigned to the air base. Nineteen Air Force members died as a result of the explosion. See Washington Post, Jun 29, 1996 at Section A, page 22.

the DoD mission will inevitably lead to protest and opposition to the proposed action. This opposition from groups who outwardly advocate against the DoD presence in their country could be lengthy and could seriously impact United States foreign policy interests.¹⁹⁹

Another point that needs to be addressed is the legality, under customary international law, of having environmental actions involving a foreign nation litigated before, and decided by, U.S. courts. At the heart of this issue is the fact that, in applying NEPA or any other domestic statute extraterritorially, the U.S. may be, in principle or practice, infringing upon a foreign sovereign's territorial integrity. Under both international law and U.S. case law this practice is frowned upon.

The sensitive foreign policy issue of having an environmental case involving environmental impacts felt solely within a foreign sovereign litigated in a United States court room, was reviewed in two cases involving the question of NEPA's extraterritoriality: *Greenpeace U.S.A. v. Stone*²⁰⁰ and *NEPA Coalition of Japan v. Aspin*.²⁰¹ In *Greenpeace*, plaintiff's sued DoD alleging that the Army had failed to conduct a comprehensive EIS before transporting U.S. nerve gas munitions across

¹⁹⁹ See generally, discussion of *Greenpeace USA v. Stone* (attempt by German citizens to stop the transport of U.S. Army chemical weapons across Germany enroute to disposal facility outside Germany) and *NEPA Coalition of Japan v. Aspin*, (Japanese citizens Seek to prevent U.S. Navy from erecting a new housing development), *infra*, Section V B./E.

²⁰⁰ 748 F. Supp. 749, 761 (D. Haw. 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).

²⁰¹ 837 F. Supp. 466 (D.D.C. 1993)

Germany enroute to disposal at Johnson Atoll.²⁰² The court held that it could not justify the political and foreign policy implications of imposing the ramifications of a domestic U.S. environmental statute (NEPA) on a foreign sovereign for acts taking place within that foreign jurisdiction.²⁰³

In *NEPA Coalition*, plaintiffs, a coalition of Japanese citizens and American environmentalists, alleged that DoD was required under NEPA to prepare an EIS for certain activities at United States Navy installations in Japan.²⁰⁴ In dismissing this claim, the court was blunt:

“By requiring DoD to prepare EISs, the court would risk intruding upon a long standing treaty relationship. Such risk suggest the presence of a nonjusticiable political question. At a minimum they raise prudential concerns over the competence of the judiciary to enter an area with no direct effects in the U.S. The preparation of EISs would unnecessarily require DoD to collect environmental data from the surrounding residential and industrial complexes, thereby intruding on Japanese sovereignty. In addition, DoD would have to access the impact of Japanese military activities at these bases.”²⁰⁵

These opinions reflect the court’s recognition of the foreign affairs headaches and embarrassments that the U.S. would face if NEPA were to be applied extraterritoriality against a foreign sovereign. Imposing the requirements of NEPA in an overseas setting would result in U.S. agencies conducting invasive inspections and fact-finding

²⁰² *Greenpeace U.S.A.* *supra* note 200 at 752.

²⁰³ See detailed discussion, Section V. B. *infra*.

²⁰⁴ *NEPA Coalition*, *supra* note 201 at 467.

²⁰⁵ *Id.* at 467 FN 5. For a detailed discussion, See Section V. E. *infra*.

investigations within a foreign territory and would require the sovereign state to provide intrusive discovery material for litigation occurring within the United States. As the court noted in *NEPA Coalition*, there is no doubt that Congress, in drafting NEPA, did not intend this result.²⁰⁶ To argue otherwise fails to comprehend the importance of customary international law, sovereignty or the importance of maintaining foreign relations with other nations.

Furthermore, considering the steps already in place to protect the overseas environment ranging from executive orders, department directives and SOFA and other international agreements, any approach to require compliance with NEPA would not seem to increase environmental protection. Instead, as discussed above, this result would more likely damage foreign relations and the national security relationship between the United States and the host foreign nation. It is difficult to believe that Congress would ever knowingly open this foreign policy “pandora’s box.”

These issues, and many others like them, have not been seriously contemplated by the courts or by Congress. Until all of the possible consequences to our military forces, national security and/or foreign relations have been addressed, it is premature to suggest applying NEPA to extraterritorial activities, unless DoD is granted a waiver from complying with the most burdensome, military and diplomatic, aspects of the statute.

2. Would NEPA Application Conflict with SOFA?

As discussed earlier, the United States has entered into many Status of Forces

²⁰⁶ *Id.* (“There is no evidence that Congress intended NEPA to encompass the actions of a foreign sovereign within its own territory.”) *Id.*

Agreements (SOFA) with the nations which host its forces. These agreements generally outline the obligations and processes that govern the actions of these U.S. forces. Before proposing the extraterritorial application of NEPA, it is important to understand how unilateral application of a domestic environmental statute might be viewed by a foreign sovereign. It is also necessary to determine whether compliance with NEPA would conflict with applicable SOFA's.

Under customary international law, a sovereign has the right to make the laws governing its territory and the right to exercise jurisdiction, without foreign interference, over both persons and object located within that sovereign.²⁰⁷ For the United States to impose a domestic environmental statute on a foreign sovereign, the statute must not conflict with applicable international laws and must be reasonable in view of the foreign sovereign's national interests.²⁰⁸

Implementing the extraterritorial application of NEPA, especially the public comment and participation provisions, would appear to violate customary international law and respected foreign policy principles. Under international law, nations negotiate and reach agreement between governments, not through separate interaction with individual citizens.²⁰⁹ DoD, in complying with NEPA, besides antagonizing a host nation, would be forced to deal directly with foreign citizens on a host of sovereign

²⁰⁷ See HENKIN, ET AL, *supra* note 104 at 286-287.

²⁰⁸ See RESTATEMENT, *supra* note 65 at §403 (1987).

²⁰⁹ See Brauchler, *supra* note 66 at 491.

environmental issues, a task very possibly differing with previously approved host nation environmental legislation,²¹⁰ as well as the customary international law concept that contacts are between sovereign governments.

Recognizing that environmental awareness is a staple of many political philosophies, any interaction by the U.S. with individual foreign citizens, within a NEPA public participation context, over national environmental concerns might be viewed by the host nation as a foreign intrusion into its national political process and a violation of international law.²¹¹ However, DoD has in place environmental protection measures that provide the necessary precautions to ensure both manageable and affordable safety to both humans and the environment rendering unilateral application of NEPA unnecessary.

3. Possible Alternatives to Unilateral Application of NEPA

Most supporters of extending NEPA to overseas activities cite to the fact that the world continues to face many “global problems such as climate change, ozone depletion, acid rain, ocean pollution and protection of living resources. These problems are quintessentially global in nature.”²¹² Pointing to urban plight and limited economic resources of many developing countries which has led to lower environmental standards

²¹⁰ *Id.* There is also the question of who would be responsible for this dialogue. Normally, the U.S. Ambassador reporting to the State Department has overall responsibility for U.S. activities in a foreign country.

²¹¹ *Id.* Besides involving the United States in a touchy foreign policy dilemma, this action would also violate existing SOFA’s. Current SOFA provisions would require DoD to obtain consent of the foreign host prior to entertaining public participation in such matters due to prohibitions against U.S. involvement in foreign political activities.

²¹² See Whitney, *supra* note 103 at 470.

than accepted within the United States and other developed nations²¹³ and recognizing that the United States has greater resources available to protect the environment, these supporters assert that applying NEPA extraterritorially is the most effective manner in which to uphold the U.S. obligation to the global environment.²¹⁴ Less noble reasons for applying the statute, of course, is to provide more stringent management of DoD, and other federal agency, environmental actions abroad.²¹⁵

Proponents for a global application of NEPA note that the U.S. is a signatory to the Convention on Environmental Impact Assessment in a Transboundary Context.²¹⁶ The argument continues that the signatories to the Convention pledged to “take the necessary legal, administrative or other measures to implement the provisions of [the] Convention, including . . . the establishment of an Environmental Impact Assessment (EIA) procedure that permits public participation and preparation of the EIA” described in the Convention.²¹⁷ Therefore, the argument concludes that the U.S., in keeping with its international law responsibilities, should take steps to implement the treaty by amending NEPA.²¹⁸

²¹³ A. Gore, THE EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT 273 (1992).

²¹⁴ See Spracker & Naftalin, *supra* note 102 at 1043.

²¹⁵ See Reichel, *supra* note 71 at 139.

²¹⁶ 30 I.L.M. 800 (1991) [hereinafter Convention].

²¹⁷ *Id.* at Art. 2 para 2, 30 I.L.M. 800, 803.

²¹⁸ See Digan, *supra* note 100 at 195.

While logical on its face, closer examination reveals a flaw. As discussed earlier, in order for a court to accurately determine whether NEPA should be applied extraterritorially requires a review of jurisdiction and how that concept of customary international law is balanced against interference with the sovereign rights of other states. Traditionally, courts have considered three factors in determining whether a domestic statute should be applied extraterritorially: jurisdiction to adjudicate, jurisdiction to prescribe, and reasonableness.²¹⁹ Jurisdiction to adjudicate requires the court to determine whether Congress intended the court to have subject matter and personal jurisdiction in which to hear the case.²²⁰ If this intent is evinced, either on the statutes face or through a reading of the legislative history, the court must still ensure that the dispute has been filed with the appropriate district court²²¹ and that proper venue has been achieved.²²²

Even if Congress intended American courts to exercise adjudicative jurisdiction, the court must determine whether Congress, itself, enjoys prescriptive jurisdiction, normally recognized as a nation's capacity to enforce its laws over its citizenry and their conduct, before applying a law extraterritorially.²²³ The exercise of prescriptive

²¹⁹ See Burghhelea, *supra* note 12 at 352.

²²⁰ *Id.* citing to U.S. CONST. art. III; 28 U.S.C. §§1330,1331 (1993).

²²¹ *Id.* citing to 28 U.S.C. §1391 (1993).

²²² *Id.* citing to RESTATEMENT, *supra* note 65 at Part IV (1987)

²²³ *Id.* at §402.

jurisdiction is premised on one of two separate principles: territoriality or universality.²²⁴

As might be expected, the principle of territoriality “confers jurisdiction because the actions in question take place in or have some impact on a nation’s territory.”²²⁵ A sovereign can exercise territorial jurisdiction either objectively (over conduct that occurs within a sovereign’s territory) or subjectively (over conduct taken abroad but which has an impact within the sovereign’s territory).²²⁶ The principle of universal jurisdiction allows a sovereign to punish certain offenses without regard to where the transgression was committed.²²⁷ However, under international law, this principle is construed very narrowly, asserted only for war crimes and piracy acts.²²⁸ Arguably, in the absence of customary international law, this principle, if asserted in an environmental context, would probably require all nations to be signatories to international agreements condemning specified acts.²²⁹

Lastly, courts must determine that the exercise of jurisdiction, whether to

²²⁴ *Id.* at §403.

²²⁵ See Burghela, *supra* note 12 at 353.

²²⁶ *Id.*

²²⁷ *Id.* citing to RESTATEMENT, *supra* note 65 at §404.

²²⁸ *Id.* citing to BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 709 (1991)

²²⁹ *Id.*

adjudicate or prescribe, is reasonable.²³⁰ Absent a reasonable rationale, a sovereign's ability to exercise jurisdiction extraterritorially is greatly weakened.²³¹ However, even if the test for reasonableness is met, the court must still balance the need to assert jurisdiction against the customary international law concept of respecting the sovereign affairs of other states.²³² This is especially true in the environmental realm where issues are deemed to be local concerns best regulated by the sovereign.²³³ Under customary international law, another nation's interference in such an area of local concern would be considered to be unduly intrusive.²³⁴ American courts have historically agreed with the view that interference with a sovereign's control over local or national issues is paramount to intruding upon that sovereigns' jurisdiction and have therefore been consistent against applying domestic statutes extraterritorially.²³⁵

The U.S. as a signatory to the Convention on Environmental Impact Assessment in a Transboundary Context pledged to issue an impact assessment prior to a decision to

²³⁰ *Id.* citing to RESTATEMENT, *supra* note 65 at §403(2) which outlines the factors that a court may use to determine reasonableness.

²³¹ *Id.*

²³² *Id.* at 353.

²³³ *Id.* at 356.

²³⁴ See Turley, *supra* note 144 at 645.

²³⁵ See Burgelea, *supra* note 12 at 356. Also See discussion Section III. B. Extraterritorial Application of U.S. Statutes.

authorize, *within its jurisdiction*,²³⁶ . . . actions that are “likely to cause a significant transboundary impact.”²³⁷ The U.S. satisfies this obligation through implementation of NEPA procedures within the United States and its territories. In areas outside the acknowledged jurisdiction of the United States, as recognized through customary international law, the U.S. satisfies its international environmental responsibilities through adherence to Executive Order, DoD directives, regulations and policies, and separate international agreements. In this way, the U.S. protects the environment while comporting with the primary purpose of the presumption against extraterritoriality which is “to protect against the unintended clashes between the [United States] laws and those of other nations which could result in international discord.”²³⁸

Moreover, proponents of an amended NEPA, while asserting that the U.S. would satisfy its international law obligation by applying the statute abroad, fail to consider how this action would violate foreign policy and the basic principles of international law previously in place, The Stockholm Declaration of 1972.²³⁹ Principle 21 states:

²³⁶ *Id.* (emphasis added).

²³⁷ Convention at Art 2 para 3, 30 I.L.M. at 804.

²³⁸ See *Environmental Defense Fund Inc., v. Massey*, 986 F. 2d 528, 530 quoting *Aramco*, 499 U.S. 244, 248 (1991)

²³⁹ Declaration of the United Nations Conference on the Human Environment, 11 I.L.M. 1416, 1420 (1972) reproduced from U.N. DOC. A/CONF. 48/14 and Corr. 1 (1972). Recognizing that international law frowns upon one sovereign trying to assert its laws upon another, the Carter Administration created Executive Order 12,114 to assist federal agency actions overseas. DoD, through promulgation of directives intended to implement the order satisfies the assessment requirement at its overseas locations, consistent with existing international agreements and foreign policy interests.

“[S]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”²⁴⁰

Notwithstanding the global changes in environmental awareness since the Declaration was signed in 1972, this language clearly supports the view that sovereigns have the exclusive right to apply their own environmental policies when conducting projects that effect their environment. For the United States to unilaterally presume to have a higher right or loftier appreciation of a nation’s environmental concerns would violate existing international laws and smacks of “unbridled paternalism” which could lead to distrust and an inevitable foreign policy breakdown.²⁴¹

More importantly for the global environment, the extraterritorial application of NEPA’s environmental impact assessment process could lead to a degradation of previous environmental protection provisions, such as the International Environmental Impact Assessment Law, which has been adopted by more than 75 nations as a strategy for confronting both domestic and transnational pollution.²⁴² Instead of promoting global environmental protection, this U.S. action could result in weakening valuable existing

²⁴⁰ *Id.*

²⁴¹ Conversation with Lt Col Richard Phelps, Chief of Environmental Law, United States Air Forces in Europe, March 1997. *See also* Maragia. *supra* note 15 at 192.

²⁴² *See* N. Robinson, International Trends in Environmental Impact Assessments, 19 B.C. ENVT'L AFF. L. REV. 591 (1992). Arguably, applying NEPA’s EIA process in a foreign state could conflict with that nation’s own EIA system as well as interfere with the effectiveness of the international EIA law.

international regimes set up to foster international cooperation in environmental protection.

What history does seem to suggest is that true environmental reform, and protection, is best handled through international diplomacy, cooperation and resolution rather than attempted unilateral action by one nation.²⁴³ Proponents of a world-wide application of NEPA argue that this approach note is idealistic, believing instead that national sovereignty is too entrenched to allow one nation to impose its legislative will upon another.²⁴⁴ Idealistic or not, the only way to confront international environmental threats is to create a relationship among nations that does not infringe upon any particular state's sovereignty, yet provides environmental benefits.²⁴⁵ This is the approach of the Convention on Environmental Impact in a Transboundary Context which encourages sovereign nations to develop compatible procedures for their mutual benefit while respecting established principles of sovereignty and international law.²⁴⁶

²⁴³ This was foreseen by the drafters of Executive Order 12,114 who ensured that the order expressly avoided any act or appearance of an act of interference by the U.S. upon the sovereignty of a foreign nation. See discussion, Section IV *infra*.

²⁴⁴ R. Gardner, *Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection*, 65 U. CIN. L. REV. 539, 559.

²⁴⁵ *Id.*

²⁴⁶ See Convention *supra* note 216 at Preamble which outlines the cooperative purpose of the Convention. (“...[D]etermined to enhance international cooperation in assessing environmental impact in particular in a transboundary context,.. .commending the ongoing activities of States to ensure that, through their national legal and administrative provisions and their national policies, environmental impact assessment is carried out.”).

The position of the Convention is logical when considering that it benefits all nations when environmental protection is achieved on a global scale. The problem that supporters of an amended NEPA fail to consider, or give due credence to, is that global application of NEPA could actually disrupt the sense of global environmental community that must take root if true protection is to be achieved. The reason for this has been noted earlier, the environmental priorities of the U.S., perhaps the worlds most developed nation, differs significantly with many of the world's developing nations²⁴⁷ For the U.S. to impose the requirements of NEPA in one of these nations ignores the fact that environmental priorities are different around the world, economic capabilities are limited, and emphasis on environmental concerns may not be universally appreciated.²⁴⁸ To press ahead could cause significant extraterritorial consequences to the foreign nation and markedly impact the U.S. ability to foster a global attitude of environmental protection.²⁴⁹

²⁴⁷ Developing nations share many of the same problems central to environmental degradation: excessive populations growth that hinders development efforts aimed at environmental protection; lack of environmental pollution awareness; lack of discipline in complying with rules and regulations intended for maintaining pollution levels; political instability; and, poor economies. See Maragia, *supra* note 15 at 191.

²⁴⁸ See Burghelea, *supra* note 12 at 372. (“[e]nvironmental priorities differ among countries at various levels of development. The less-developed countries are likely to have fewer resources and less ability to afford environmental protection than the wealthier countries.”).

²⁴⁹ It is understandable that the imposition of a NEPA-type process by the U.S. could cause significant consequences to a third world nation that has few economic resources to absorb such a process and little, if any, inclination to relinquish its decision-making control over its natural resources to us.

It would also be a potential setback to foreign policy interests.²⁵⁰ Finally, the perception of U.S.-induced pressure could result in a backlash of anti-environmental actions effectively eliminating many of the environmental gains made around the world in the past twenty years.²⁵¹

The best way to approach environmental protection overseas is to reach agreement through international discourse. For example, the global community has learned that ocean dumping is best controlled through international compacts such as the London Dumping Convention.²⁵² Likewise, protection of the world's living resources has best been achieved through international agreements such as the United Nations Convention on the Law of the Sea,²⁵³ and the International Convention for the Regulation of Whaling.²⁵⁴ These type of approaches are consistent with the manner in which DoD presently handles its environmental programs overseas.²⁵⁵ DoD, through its regulations

²⁵⁰ See HENKIN, ET AL, *supra* note 104 at 339.

²⁵¹ The reason for this backlash is simple: extending a U.S. domestic statute to a foreign nation encroaches upon the authority of that sovereign to engage in its own national decision-making. This could result in the foreign nation rebelling against any form of environmental "enforcement." See Maragia, *supra* note 15 at 191.

²⁵² 11 I.L.M. 1294 (1972).

²⁵³ 21 I.L.M. 1261 (1982).

²⁵⁴ 25 I.L.M. 1587 (1986).

²⁵⁵ Taking this approach to the next level, DoD has recognized that it can provide a leadership role in international environmental protection and security by taking advantage of its military-to-military relationship with nations around the world. To that end, DoD has begun a process in which it encourages other militaries around the world to begin, or enhance, cultural [environmental] change in terms of their attitude toward the environment. An example of this approach was the Western Hemisphere Defense

and directives, made pursuant to Executive Order, helps achieve environmental protection through SOFA agreements to which it is a party. The flexibility of these procedures allow DoD to recognize and react to differing environmental concerns at each of the countries in which it has a force stationed.

IV. EXECUTIVE ORDER 12,114

A. Background

In 1979, President Jimmy Carter, concerned about the possible environmental effects of federal agency actions abroad, and the lack of clarity on this issue,²⁵⁶ promulgated Executive Order 12,114, *Environmental Effects Abroad of Major Federal Actions*, which had the effect of imposing limited “NEPA-like” compliance on federal agency actions overseas.²⁵⁷ Arguably, the principle reason for issuing the order, which created an entirely independent and separate regime of law governing federal agency

Environmental Conference hosted by the Office of the Deputy Under Secretary of Defense for Environmental Security and the United States Southern Command (SOUTHCOM) held June 2-4, 1997 in Miami, Florida. This conference ,which hosted senior military officials and elected officials from most of the nations of Central and South America, focused on developing strategies and plans to address military environmental needs and goals. The primary goal of conference attendees was to allow military leadership, civilian government and representatives from academia to establish a foundation for future cooperation on the environmental dimension of currently assigned military missions and defense forces. The object of this, and other DoD initiatives, is to get foreign military forces to think about what individual forces can do to improve and protect the environment. This exercise fits nicely within DoD’s goal of demonstrated leadership in environmental excellence and is a positive role as the agency moves into the 21st century.

²⁵⁶ Gaines, *Environmental Effects Abroad Of Major Federal Actions: An Executive Order Ordains A National Policy*, 3 HARV. ENVT'L L. REV. 136 (1979).

²⁵⁷ Exec. Order No. 12,114, *supra* note 101 at Sec. 2-1.

environmental decision-making outside the United States, was the Carter Administration's recognition that NEPA did not apply to overseas decision-making.

While clearly intended to further the purpose of NEPA in overseas actions, Executive Order 12,114 never cites to NEPA specifically as its authority, but instead, declares that: “[b]y virtue of the authority vested in me [as President] by the Constitution and laws of the United States[,] . . .”²⁵⁸ this order “further[s] the purpose of the National Environmental Policy Act. . . .”²⁵⁹ The genesis of this order represents an attempt to balance the foreign policy considerations of DoD actions overseas with the need to protect the overseas environment in which these actions occur.²⁶⁰ It was also designed to provide federal agency actions abroad with procedures that protected the environment but also provided the flexibility NEPA failed to provide concerning foreign policy and sovereignty issues.

The “authority” language of the order was drafted intentionally to eliminate the requirement of federal agencies to have to explicitly adhere to NEPA guidelines which would hamper the agency’s bid to develop their own procedures.²⁶¹ Unlike NEPA, Executive Order 12,114 clearly states that it “represents the United States government’s *exclusive and complete determination* of procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with

²⁵⁸ *Id.* at Preamble.

²⁵⁹ *Id.* at Sec. 1-1.

²⁶⁰ See Brauchler, *supra* note 66 at 481.

respect to the environment *outside the geographical borders of the United States and its territories and possessions*.²⁶² The order required all federal agencies to implement the provisions within eight months of the effective date of the order.²⁶³

Recognizing that NEPA requirements abroad could potentially interfere with the sovereignty of foreign host nations, the order was intended to assist federal agencies in regulating international environmental concerns through bilateral or multilateral approaches.²⁶⁴ To that end, Executive Order 12,114 *Seeks* to “further environmental objectives consistent with the foreign policy and national security policy of the United States”²⁶⁵ by directing DoD (and other federal agencies) to establish and implement procedures for four categories of major federal actions that are subject to the procedural requirements of the order instead of NEPA:

- (a) Actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica);
- (b) Actions significantly affecting the environment of a foreign nation not participating with the U.S. and not otherwise involved in the action;
- (c) Actions significantly affecting the environment of a foreign nation by generating a toxic or radioactive product which is prohibited or strictly regulated in the U.S.; and;
- (d) Actions outside the U.S., its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection by the President or international agreement.²⁶⁶

²⁶¹ See, Gaines, *supra* note 256 at 146.

²⁶² Exec. Order No. 12,114, *supra* note 101 at §2-1. (emphasis added).

²⁶³ *Id.*

²⁶⁴ *Id.* at §2-5(b).

²⁶⁵ *Id.* at Preamble.

²⁶⁶ *Id.* at Sec. 2-3(a)-(d).

In order to comply with the order, Federal agencies are required to document the impacts of the various actions listed above under Section 2-3 by using environmental impact statements, environmental studies, and environmental assessments and other reviews.²⁶⁷

Executive Order 12,114 also provides several exemptions to certain actions that can have an important bearing on whether a federal agency is required to provide the environmental analysis required under the order. Among the exemptions relevant to this paper are the following:

- (1) Actions not having a significant effect on the environment outside the United States as determined by the agency;²⁶⁸
- (2) Actions taken by the President;²⁶⁹
- (3) Actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict.²⁷⁰

Understanding the delicate nature of foreign sovereignty concerns, the drafters inserted broad policy considerations into the Executive Order which act to allow a federal agency to modify the preparation of an environmental document when necessary to meet critical national interests.²⁷¹

²⁶⁷ *Id.* at Sec. 2-4(a)(i)-(iii).

²⁶⁸ *Id.* at Sec. 2-5(a)(i).

²⁶⁹ *Id.* at Sec. 2-5(a)(ii). See, discussion on “Operation Sea Signal.” *infra*, Section VIII A. 1.

²⁷⁰ *Id.* at Sec. 2-5(a)(iii).

²⁷¹ Some of these modifications which are of interest to this paper include considerations which:

- (1) Enable the agency to decide and act promptly as when required;
- (2) Avoid adverse impacts on foreign relations or infringement in fact or in appearance of other nations’ sovereign responsibilities; and,
- (3) Ensure appropriate reflection of . . . national security considerations.

Id. at Sec. 2-5(b)(i-iii).

The order also provides federal agencies with the authority to provide for categorical exclusions²⁷²(CATEXs) and other exemptions, in addition to those previously specified, as they may be necessary to meet “emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances.”²⁷³

As opposed to NEPA however, Executive Order 12,114 affords federal agencies the flexibility necessary to accomplish their overseas mission. One example of this flexibility is the fact that Executive Order 12,114 limits the scope of actions required in preparing an EIS.²⁷⁴ For example, in many cases the executive order allows the federal agency to prepare a less comprehensive EA of its actions.²⁷⁵ This can be an important benefit to American forces required to make environmental assessments in time-sensitive operational deployments.

Another important difference between NEPA and Executive Order 12,114 is the definition of what constitutes an action significantly affecting the environment. Unlike

²⁷² A categorical exclusion allows a federal agency to forgo an EA or EIS if the agency concludes that the proposed action would normally not, individually or cumulatively, result in significant harm to the environment.

²⁷³ Exec. Order No. 12,114, *supra* note 101 at § 2-5(c) which requires the authorizing agency to consult, as soon as feasible, with the Department of State and the CEQ.

²⁷⁴ See EIS list *supra* note 271; See also G. Pincus, Note, *The “NEPA-Abroad” Controversy: Unresolved by an Executive Order*, 30 BUFF. L. REV. 611, 638-51 (1981).

²⁷⁵ See, Exec. Order No. 12,114, *supra* note 101 at §§2-3 through 2-5, 3 C.F.R. §§357-59 (1980).

NEPA which applies to actions “affecting the quality”²⁷⁶ of the environment, which arguably includes positive and negative effects, under the Executive Order the threshold required before requiring assessment is the more focused standard of whether the action “does significant harm” to the environment.²⁷⁷ This definition recognizes it is unknowing harm that is sought to be avoided.

B. DoD Implementation of E.O. 12,114 through DoD Directive 6050.7

DoD implemented Executive Order 12,114 through DoD Directive 6050.7²⁷⁸ in August 1979 by declaring that the directive:

“provides policy and procedures to enable Department of Defense (DoD) officials to be informed and take account of environmental considerations when authorizing or approving certain major federal actions that do significant harm to the environment of places outside the United States.”²⁷⁹

The proposed purpose of the directive was to “establish internal procedures to achieve this purpose, and nothing in it shall be construed to create a cause of action.”²⁸⁰

In essence, the directive highlights the most significant differences between Executive Order 12,114 and NEPA. As previously discussed, NEPA requires an EIS to be completed for all major federal actions that may have a significant impact on the environment. The EIS, often a lengthy and comprehensive document, must justify the

²⁷⁶ 42 U.S.C. §4332(2)(C) (1988)

²⁷⁷ Exec. Order No. 12,114, *supra* note 101 at §3-4, 3 C.F.R. §360 (1980).

²⁷⁸ DoD Dir. 6050.7 *Environmental Effects Abroad of Major Department of Defense Actions* (31 Mar 1979).

²⁷⁹ *Id.* at para. A.

²⁸⁰ *Id.* at para A.

purpose and the need for the proposed agency action through compilation of extensive environmental data. Clearly, unless authorized by a sovereign host, it would be impermissible for DoD, or any other federal agency, to perform a unilateral inspection and evaluation required by an EIS in a foreign territory.

In contrast, the directive provides much more flexibility by allowing DoD to prepare either an environmental review,²⁸¹ which can be prepared unilaterally by DoD, or a bilateral or multilateral environmental study,²⁸² which are produced between the sending and receiving states. This allows DoD the ability to take into consideration the various complexities of foreign policy which affect its overseas mission. More importantly, the order, as implemented by DoD through Directive 6050.7, recognizes the unique mission requirements of the United States Department of Defense and affords it the required flexibility to deal with the foreign host nation in ways that NEPA would not allow.

The directive further states that Executive Order 12,114 “provides the exclusive and complete requirement for taking account of considerations with respect to actions that do significant harm to the environment of places *outside* the United States.”²⁸³ Finally, the directive asserts that “Executive Order 12114, . . prescribes the exclusive and

²⁸¹ Concise reviews of the environmental issues involved that are prepared unilaterally by the United States. *Id.* at encl. 2, sec. C.(1) (a)(2).

²⁸² Bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations or by an international body or organization in which the United States is a member or participant. *Id.* at encl. 2, sec. C.(1) (a)(1).

²⁸³ *Id.* at para. A. (emphasis added).

complete procedural measures and other actions to be taken by the Department of Defense to further the purpose of the National Environmental Policy Act with respect to the environment outside the United States.”²⁸⁴

C. DoD Directive 6050.7, Enclosures 1 & 2

DoD Directive 6050.7 has two enclosures which provide the requirements for DoD environmental considerations. Enclosure 1 implements the requirements of Executive Order 12,114 with respect to major DoD actions that do significant harm to the environment of the global commons.²⁸⁵ Enclosure 2 implements the requirements of Executive Order 12,114 as it applies to the following actions:

- (a) Major federal actions that significantly harm the environment of a foreign nation that is not involved in the action. The focus of this category is on the geographical location of the environmental harm and not on the location of the action;
- (b) Major federal actions that are determined to do significant harm to the environment of a foreign nation because they provide to that nation: (1) a product . . . that is prohibited or strictly regulated by federal law in the United States because its toxic effects on the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances; and,
- (c) Major federal actions outside the United States that significantly harm natural ecological resources of global importance designated for protection by the President . . . “²⁸⁶

²⁸⁴ *Id.* at para. D. 5.

²⁸⁵ “Global Commons” is defined as geographical areas that are outside the jurisdiction of any nation and includes the oceans outside the territorial limits and Antarctica. *Id.* at para. C.4.

²⁸⁶ *Id.* at encl. 2, sec. B 1(a)-(c).

Enclosure 2 also provides clarification as to what constitutes a “federal action”²⁸⁷ and “major action.”²⁸⁸ The directive excludes the deployment of ships, aircraft, or other mobile military equipment from the definition of major action.²⁸⁹ The directive requires the use of two documents when considering environmental actions, environmental studies, and environmental reviews.²⁹⁰ Contrasted with the EIS requirement, which is usually prepared as a unilateral document, these documents are flexible in application and encourage DoD’s consultation with a host foreign nation during preparation.²⁹¹ This flexibility is vital to DoD’s ability to negotiate overseas environmental issues with foreign hosts.

The directive provides for categorical exclusions in certain circumstances

²⁸⁷ *Id.* at encl.2, sec. C. 2. (“An action that is implemented or funded directly by the United States Government. It does not include actions in which the United States participates in an advisory, information-gathering, representational, or diplomatic capacity but does not implement or fund the action; actions taken by a foreign government or in a foreign country in which the United States is a beneficiary of the action, but does not implement or fund the action; or actions in which foreign governments use funds derived indirectly from United States funding.)

²⁸⁸ *Id.* encl. 2, sec. C. 5. (“An action of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale or has substantial environmental effects on a more limited geographic area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated.”)

²⁸⁹ *Id.* at C. 5., page 2.

²⁹⁰ *Id.* encl. 2, sec. C.(1)(a)(1-2)).

²⁹¹ *Id.* at encl. 2, sec. D.(1-3). (“An environmental study is a cooperative action and not a unilateral action undertaken by the United States. It may be bilateral or multilateral, and it is prepared by the United States in conjunction with one or more foreign nations. . . .”)

and a list of general exemptions is located in Enclosure 2 which, similar to the exemptions found in Executive Order 12,114,²⁹² relieves many overseas military activities from the compliance requirements of the directive.²⁹³ Furthermore, the directive authorizes DoD to establish two additional exemptions that apply only to

²⁹² Exec. Order No. 12,114, *supra* note 101 at Section 2-5(a)(i)-(vii).

²⁹³ DoD Dir. 6050.7, *supra* note 278 at encl. 2, Sec. C.3.(a)(1)-(10). These exemptions are listed as follows:

(1) Actions that the DoD component concerned determines do not do significant harm to the environment outside the United States or to a designated resource of global importance.

(2) Actions taken by the President, to include signing bills into law; signing treaties and other international agreements; the promulgation of Executive Orders; Presidential proclamations; and the issuance of Presidential decisions, instructions, and memoranda.

(3) Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of an armed conflict.

(4) Actions taken by or pursuant to the direction of the President or a cabinet officer when the national security or national interest is involved. This determination must be made by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

(5) The activities of the intelligence components utilized by the Secretary of Defense under Executive Order 12036, 43 Fed. Reg. 3674 (1978).

(6) The decisions and actions of the Office of the Assistant Secretary of Defense (International Security Affairs), the Defense Security Assistance Agency, and the other responsible offices within DoD components with respect to arms transfers to foreign nations.

(7) Votes and other actions in international conferences and organizations. This includes all decisions and actions of the United States with respect to representation of its interest at international organizations, and at multilateral conferences, negotiations, and meetings.

(8) Disaster and emergency relief actions.

(9) Actions involving export licenses, export permits, or export approvals, other than those relating to nuclear activities.

(10) Actions relating to nuclear activities and nuclear materials, except actions providing to a foreign nation a nuclear production or utilization facility, as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility.

DoD operations. These exemptions are “case-by-case exemptions” and “class exemptions.”²⁹⁴ Case-by-case exemptions, other than those specified above, may be required due to emergencies, national security considerations, exceptional foreign policy requirements, or other special circumstances which preclude or are inconsistent with the preparation of environmental documentation and the taking of other actions prescribed by the enclosure.²⁹⁵ Class exemptions, on the other hand, are for circumstances which may exist where a class exemption for a group of related actions is more appropriate than a specific exemption.²⁹⁶

Finally, the directive authorizes categorical exclusions established by the Department of Defense.²⁹⁷ these exemptions, in light of policy decisions made by DoD, arguably, represent a great improvement over NEPA which does not provide a ready exemption mechanism from EIS requirements in the event that overseas military units are deployed into an emergency situation.

V. JUDICIAL INTERPRETATION OF NEPA’S EXTRATERRITORIAL APPLICATION

Largely as a result of the ambiguity of NEPA’s statutory language, the

²⁹⁴ *Id.* at encl. 2, Sec. C.3.b.

²⁹⁵ *Id.* at encl. 2, Sec. C.3.b.(1).

²⁹⁶ *Id.* at encl. 2, Sec. C.3.b.(2). Class exemptions may be established by the assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) who, with the Assistant Secretary of Defense (International Security Affairs), shall consult, before approving the exemption, with the Department of State and the Council on Environmental Quality.

²⁹⁷ *Id.* at encl. 2, Sec. C.4.

unanswered question of whether NEPA applies to major Federal actions overseas has been left to the purview of the courts. Prior to *Environmental Defense Fund v. Massey*,²⁹⁸ most courts had refused to hold NEPA applicable outside the United States, although most courts limited their findings to the facts of the instant case.

A. NRDC v. Nuclear Regulatory Comm'n.

NRDC v. Nuclear Regulatory Comm'n,²⁹⁹ dealt with whether the NRC had to prepare an environmental impact statement to consider potential health and safety impacts, solely within the Philippines, resulting from its authorization to export a nuclear reactor to that nation. The NRDC asserted that the NRC did not have the authority to export a nuclear reactor without completing an EIS after the United States and the Philippines signed a treaty which included provisions for the United States sale of a nuclear reactor.³⁰⁰

Based on this agreement, Westinghouse, an American corporation, sought an export license from the NRC to ship the reactor.³⁰¹ Following established procedures, the NRC forwarded the request to the State Department for review and coordination. The State Department subsequently recommended approval of the request for export.³⁰² The

²⁹⁸ 772 F. Supp. 1296 (D.D.C. 1991), rev'd, 986 F.2d. 528 (D.C. Circ. 1993).

²⁹⁹ 647 F.2d 1345,1366 (D.C. Circ. 1981)

³⁰⁰ *Id.* at 1351

³⁰¹ *Id.*

³⁰² *Id.* at 1352 (The record indicates that the State Department had two initial concerns with the export of the reactor. The first was the fact that the reactor was to be placed along side an identified earthquake fault line in the Philippines. Second, there were over

NRC then authorized the export of the reactor.³⁰³ However, prior to that approval, NRC examined and found that the exportation of the reactor “would not create unacceptable health, safety and environmental risks to U.S. territory or the global commons.”³⁰⁴ It did not, however, prepare an EIS examining the environmental impact of the proposed sale in the Philippines.³⁰⁵ The NRDC then sued to force an EIS that would cover the effects in the Philippines.³⁰⁶

The court disagreed with the NRDC position and concluded that NEPA was primarily concerned with international cooperation instead of unilateral environmental protection through its application.³⁰⁷ As a basis for its decision, the court noted that the Nuclear Non-Proliferation Act³⁰⁸ did not require the NRC to perform an administrative review of environmental impacts in a receiving country.³⁰⁹ The court also focused on the number of bilateral treaties and international agreements existing between the two

32,000 Americans assigned to military bases in the Philippines within a few miles of the proposed site of the reactor. These concerns were eventually resolved to the satisfaction of the agency in discussions with the Philippine Atomic Energy Commission.) *Id.*

³⁰³ *Id.* at 1366.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1353.

³⁰⁶ NRDC contended that the NRC finding was meaningless in light of the nearly 32,000 U.S. military and civilian personnel stationed near the reactor site. *Id.* at 1355.

³⁰⁷ *Id.* at 1366. ([NEPA’s language] “looked toward cooperation, not unilateral action, in a manner consistent with [American] foreign policy.”) *Id.*

³⁰⁸ 22 U.S.C. §§3201-3282 (1988).

³⁰⁹ *NRDC v. Nuclear Regulatory Comm’n, supra* note 299 at 1362.

countries which indicated to the court that Congress had not intended NEPA, a domestic United States law, to interfere with this type of proposed action.³¹⁰

The court further went on to hold that NEPA was to be applied internationally only “where consistent with the foreign policy of the United States.”³¹¹ Thus, the court, relying on the foreign policy exception to NEPA, upheld the presumption against its extraterritorial application and affirmed NRC’s approval of the nuclear reactor export license to the Philippines.³¹²

B. Greenpeace, USA v. Stone

Likewise, in *Greenpeace, USA v. Stone*,³¹³ the District Court in Hawaii concurred with a DoD proffered position that NEPA did not apply to a major federal actions occurring overseas. Petitioner, Greenpeace sued Seeking a preliminary injunction arguing that the United States government, in this case, the Army, had violated NEPA by failing to prepare an EIS while planning to transport U.S. nerve gas through Germany en route to a German port for shipment through open, international waters.³¹⁴

The Army planned to transport the missiles to Johnston Atoll, a U.S. territory

³¹⁰ *Id.* at 1364.

³¹¹ *Id.* at 1366, quoting 42 U.S.C. § 4332(2)(F).

³¹² *Id.* at 1368.

³¹³ 748 F. Supp. 749, 761 (D. Haw. 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).

³¹⁴ *Id.* at 752.

controlled by DoD, located in the Pacific ocean.³¹⁵ Upon reaching its destination, the nerve gas was to be incinerated at a designated DoD disposal system on the island.³¹⁶ The Army completed three EISs in accordance with NEPA with respect to the storage and incineration facility at Johnston Atoll,³¹⁷ but did not complete an EIS with regard to the proposed transportation route through Germany.³¹⁸ The Army did, however, receive permission from the German Federal Minister of Transport to move the nerve gas from its storage site to the German North Sea port of Nordenham for shipment.³¹⁹

In addition to the three EISs prepared under NEPA, the Army also completed a Global Commons Environmental Assessment (GCEA) examination pursuant to Executive Order 12,114, which explored the potential impacts of the nerve gas shipment from Nordenham to the territorial waters extending 12 nautical miles from Johnston

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* at 753. In 1983 the Army published an EIS which addressed the construction and operation of the facilities designed to destroy the chemical weapons which were already stored on Johnston Atoll. In 1988, The Army published a second EIS addressing the disposal of solid and liquid wastes which the Johnston Atoll Chemical Agent Disposal System (JACADS) project would produce. In 1990, the Army published a second supplemental EIS which specifically addressed disposal of the European stockpile at Johnston Atoll. This supplemental EIS addresses the impact of (1) the transportation of the munitions from the edge of the territorial waters surrounding Johnston Atoll to a pier on the Atoll; (2) unloading the munitions at the JACADS facility; (3) storage of the munitions at the facility; and (4) the destruction of the munitions. *Id.* at 754

³¹⁸ *Id.* at 753.

³¹⁹ *Id.* at 754.

Atoll.³²⁰ The result of this Global Commons assessment concluded that “normal operations. . . would cause no significant impact on the environment of the global commons. . .³²¹

In its suit, Greenpeace argued that the Army was required under NEPA to complete a comprehensive EIS which would cover the removal, shipment and destruction of the munitions.³²² However, the court, relying on the “guidance [drawn] from the [NRDC v. NRC] court’s reasoning”³²³ held that Greenpeace had failed to overcome the presumption against NEPA extraterritorial application and denied the preliminary injunction motion.³²⁴ In finding against Greenpeace, the court again focused on “the political question and foreign policy considerations which would necessarily result from such an application of a United States statute . . .”³²⁵

Specifically, the court deemed dispositive the fact that the munitions shipment was made in accordance with an agreement between Presidents Reagan and Bush and the West German Chancellor Kohl.³²⁶ Respecting German sovereignty, the court held that

³²⁰ *Id.*

³²¹ *Id.* at 762, note 14. Some of the acts the Army considered to be outside normal operations that would have impacted the global commons included a fire on board the ship transporting the nerve gas, the ship being lost at sea, or a terrorist attack. *Id.*

³²² *Id.*

³²³ *Id.* at 759, note 10.

³²⁴ *Id.* at 757.

³²⁵ *Id.*

³²⁶ *Id.* at 757-8. President Reagan had agreed to remove the nerve gas from

application of NEPA to actions outside the United States would cause foreign policy conflicts and interfere with the decision-making functions of both the United States and foreign sovereigns.³²⁷ The court held that the EIS requirement only applied to the incineration process at Johnston Atoll and not to transportation routes through Germany.

C. The District Court Massey Decision

In *Massey*, the Environmental Defense Fund (EDF) brought suit in the United State District Court for the District of Columbia seeking a court ruling that would prevent the National Science Foundation (NSF) from building a facility to incinerate food wastes at its McMurdo Station in Antarctica.³²⁸ EDF argued that the incineration might “produce highly toxic pollutants which could be hazardous to the environment”³²⁹ and asked the court for declaratory and injunctive relief under 42 U.S.C. 4332(2)(c)³³⁰ asserting that NSF had violated NEPA’s requirement to prepare a proper EIS as required under NEPA

Germany by December 1992. President Bush, upon taking office, agreed to speed up the removal no later than December 1990.

³²⁷ *Id.* at 761. The court was especially concerned that applying NEPA to the move would result in the appearance of a lack of U.S. respect for Germany’s “sovereignty, authority and control over actions taken within its borders.” This was due primarily to the fact that the West German government had reviewed and approved the operation and a West German court had denied a request for injunctive relief brought by West German citizens to halt the movement. *Id.* at 760.

³²⁸ *Environmental Defense Fund v. Massey*, 772 F. Supp. 1296, 1297 (D.D.C. 1991).

³²⁹ *Id.* Although the NSF was improving its incineration method from an open pit fire to a technically superior incinerator system.

³³⁰ *Id.*

and Executive Order 12,114.³³¹

The District Court, using the Supreme Court analysis articulated in *Equal Opportunity Employment Commission v. Arabian American Oil Co.* (Aramco)³³² determined that for a statute to apply extraterritorially “the affirmative intention of the Congress [must be] clearly expressed.”³³³ After reviewing the applicable NEPA provisions, the court, finding no clear expression of Congress’ affirmative intention to apply NEPA extraterritorially,³³⁴ dismissed the case citing lack of subject matter jurisdiction.

D. The Court of Appeals Massey Decision

The United States Court of Appeals for the District of Columbia reversed the *Massey* district court.³³⁵ Its rationale centered around two points: whether Antarctica was a sovereign nation for NEPA purposes and whether the decision-making process to incinerate the waste was made in the U.S. or Antarctica.

As a basis for its reasoning, the court cited three general categories of cases for which the presumption against the extraterritorial application of statutes does not apply.³³⁶

³³¹ *Id.*

³³² *Equal Opportunity Employment Commission v. Arabian American Oil Co.* 499 U.S. 244 (1991).

³³³ See *Environmental Defense Fund v. Massey*, *supra* note 328 at 1297 (quoting Aramco, 499 U.S. at 248).

³³⁴ *Id.*

³³⁵ *Environmental Defense Fund v. Massey*, 986 F. 2d 528, 529 (D.C. Cir. 1993).

³³⁶ *Id.* at 531.

The first, when “an affirmative intention of the Congress clearly expressed” extends the scope of the statute to cover conduct occurring outside the U.S.³³⁷ Second, the presumption is not usually applied when a failure to extend the statute to conduct abroad will result in adverse effects within the U.S.³³⁸ Lastly, the court held the presumption is not applicable when the regulated conduct occurs within the United States since by definition “an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders.”³³⁹

With these criteria as a basis, the *Massey* appellate court faulted the lower court opinion for failing to address the “threshold question of whether the application of NEPA to agency actions in Antarctica presents an extraterritorial question at all.”³⁴⁰ The appellate court held that “NEPA is designed to control the decision-making process of United States federal agencies, not the substance of agency decisions.”³⁴¹ In continuing, the court noted that NEPA “created a process whereby American officials, while acting in the United States, can reach enlightened policy decisions by taking into account environmental effects.”³⁴² Since the United States exercised “a great measure of legislative control” over Antarctica, a sovereign less continent, the court concluded that “the

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 532.

³⁴¹ *Id.*

³⁴² *Id.*

presumption of territoriality has little relevance and a dubious basis for application” in this case.³⁴³

Citing NEPA’s broad language, and absent a conflict with international law or foreign policy considerations,³⁴⁴ the court held that the statute applied to decisions regarding actions having environmental effects partly or entirely outside the United States.³⁴⁵ For a federal agency, like DoD, which conducts much of its decision-making process in the United States, the only saving grace to *Massey* was the court’s parting caveat which noted that “we do not decide [*today*] . . . how NEPA might apply to actions in a case involving an actual foreign sovereign. . . ”³⁴⁶ (emphasis added).

E. NEPA Coalition of Japan v. Aspin

Another sovereignty issue arose in *NEPA Coalition of Japan v. Aspin*,³⁴⁷ the first extraterritorial case decided after *Massey* which clearly lays out the NEPA foreign policy exception. Plaintiffs, a coalition of Japanese citizens and American environmentalists, alleged that DoD was required under NEPA to prepare an EIS for certain activities at United States Navy installations in Japan.³⁴⁸ The plaintiff’s asserted that DoD’s failure to

³⁴³ *Id.* at 534.

³⁴⁴ *Id.* at 536.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 537

³⁴⁷ *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993)

³⁴⁸ *Id.* at 467.

comply with NEPA constituted non-compliance.³⁴⁹ What is interesting about *NEPA Coalition* is the fact that plaintiffs, with the experience gained from the earlier *Massey* litigation, asserted the same argument used so successfully in *Massey* to try and overcome the defense raised by the government--the presumption against extraterritoriality.³⁵⁰

In particular, the plaintiff's focused on the portion of the *Massey* holding which found the decision-making process in Antarctica to be "uniquely domestic."³⁵¹ Asserting that the situation in Japan was similar, plaintiff's argued that since all military decision-making for activities in Japan was initiated in Washington D.C., the foreign policy exception to NEPA should not apply.³⁵²

The D.C. District Court, deciding that *Massey* was not controlling,³⁵³ concluded that the "legal status of United States bases in Japan is not analogous to the status of American research stations in Antarctica" and granted summary judgment for the government.³⁵⁴ The court, in distinguishing *Massey*, held that the *Massey* court opinion was limited to its facts and clearly revolved around the unique status of Antarctica, a

³⁴⁹ *Id.*

³⁵⁰ Pls' Mem. in Reply to Resp. of Defs. to Pls' Notice of Filing at 1, *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

³⁵¹ *Id.* at 3.

³⁵² *Id.* at 1.

³⁵³ *NEPA Coalition of Japan*, *supra* note 347 at 467. (The court noted that the *Massey* court expressly limited its ruling by refusing to determine whether NEPA might apply to actions involving a sovereign nation.) *Id.*

³⁵⁴ *Id.*

sovereign-less continent.³⁵⁵ Furthermore, the court noted that the *Massey* court itself, had expressly limited its ruling by failing to resolve the question of whether NEPA would apply to federal actions overseas involving a sovereign nation.³⁵⁶

Dismissing the plaintiff's argument that Navy activities in Japan were of "domestic" origin, the court cited the fact that, unlike Antarctica, United States military operations in Japan were governed by international treaties³⁵⁷ and a Status of Forces Agreement.³⁵⁸ The court concluded that these international agreements were better able to respond to the environmental concerns addressed by the plaintiffs³⁵⁹ and that "requiring DoD to prepare an EIS ". . . would risk intruding upon a long standing treaty relationship."³⁶⁰

Moreover, the court held that plaintiff's were unable to show that Congress intended NEPA to apply in situations where there is a "substantial likelihood that treaty relations will be affected."³⁶¹ Based on this reasoning, the court had no difficulty

³⁵⁵ *Id.*

³⁵⁶ *Id.* (Citing *Environmental Defense Fund v. Massey*, *supra* note 335 at 537).

³⁵⁷ Treaty of Mutual Cooperation and Security of 1960, U.S.-Japan, 11 U.S.T. 1632, 1633-35.

³⁵⁸ Administrative Agreement under Article III of the Security Treaty Between the U.S. and Japan, Feb. 28, 1952, U.S.-Japan, 3 U.S.T. 3341, 3342-62.

³⁵⁹ *NEPA Coalition*, *supra* note 347 at 467. (One Subcommittee established by the treaty deals primarily with the environment and noise abatement.)

³⁶⁰ *Id.*

³⁶¹ *Id.* citing to *NRDC v. Nuclear Regulatory Comm'n*, *supra* note 299 at 1366-67 (D.C. Cir. 1981).

determining that the presumption against extraterritoriality applied “with particular force” to the case.³⁶² Furthermore, noting that “even if NEPA did apply . . . no EIS would be required because U.S. foreign policy interests outweigh the benefits from preparing an EIS.”³⁶³ However, the court noted that their determination affirming the presumption against extraterritoriality was fact-specific and did not address whether NEPA might apply in other factual contexts.³⁶⁴

A review of the decisions reached in these cases demonstrate that while routinely upholding the presumption against extraterritorial application of NEPA, with the marked exception of *Massey*, courts have uniformly failed to address the underlying issue of whether NEPA *applies* extraterritorially in areas not recognized as a global common. (emphasis added). Decisions are based on the facts presented in the instant case and are carefully drafted to limit application to those facts. Taken together, these cases illustrate the fact that where United States foreign policy interests have been significant, courts have been nearly unanimous in upholding the presumption against extraterritorial application of NEPA. Perhaps even more interesting is that this has been accomplished while avoiding any serious in-depth study on the potential effects of the extraterritorial application of U.S. environmental statutes.

³⁶² *Id.* The court made clear the importance of the fact Japan was instrumentally involved in the proposed Navy action.

³⁶³ *Id.* at 468. For a detailed discussion as to how this policy is being changed by DoD, See Section VIII B. Modification of DoD Directive 6050.7, *infra*.

³⁶⁴ *Id.*

VI. PRESIDENTIAL REVIEW DIRECTIVE 23 (PRD 23)

In the aftermath of the *Massey* decision, the Clinton Administration directed the National Security Council (NSC) to conduct an interagency Presidential review concerning the question of NEPA's extraterritoriality and the application of Executive Order 12,114.³⁶⁵ The purpose of a Presidential review directive is to evaluate the current status of an existing law or policy with the intent of remedying any major weaknesses it may have.³⁶⁶ In response to this tasking, the NSC issued a report on 26 January 1994 which concluded that NEPA does not apply to United States activity in other nations and should not be revised to encompass such activity.³⁶⁷

However, the report also suggested numerous Executive Order 12,114 amendments which would require greater public participation, limitations on the "participating country" exception³⁶⁸ to EO 12,114, modifications in the "emergency/disaster relief" exemption, and environmental assessment of international agreements.³⁶⁹ It has been suggested that these proposed changes to the order "would

³⁶⁵ Presidential Review Directive/NSC-23, U.S. Policy on Extraterritorial Application of the National Environmental Policy Act (NEPA), 8 April 1993.

³⁶⁶ See, Brauchler, *supra* note 66 at FN 1.

³⁶⁷ R. Whitaker, *Environmental Aspects of Overseas Operations*, THE ARMY LAWYER (April 1995), pages 27-39 at FN 27 citing to two NSC documents, "Proposed Revisions to EO 12,114" and "Summary of Agency Comments on PRD-23 Proposed Package."

³⁶⁸ Partly as a result of this review, DoD is currently working to revise the provision of DoDD 6050.7 which exempts it from performing an environmental review if the host foreign nation is participating in the proposed activity.

³⁶⁹ See, Brauchler, *supra* note 66 at 489.

cripple. . . the performance of its [DoD] duties abroad, thus endangering the overall success of its overseas mission.”³⁷⁰ However, no action has been taken on PRD 23 since 1994 and some DoD officials believe it may have been permanently shelved in light of recent environmentally positive changes DoD has made to its directives and policy.³⁷¹

VII. CURRENT DoD OVERSEAS ENVIRONMENTAL COMPLIANCE POLICIES

Since the late 1980's, the language and actions coming out of the Pentagon concerning the environment have reflected a conscientious decision to embrace the environmental responsibility inherent in being the world's last true military superpower.

Consider the words of former Secretary of Defense Richard Cheney in 1989:

“This Administration [Bush] wants the United States to be the world leader in addressing environmental problems and I want the Department of Defense to be the Federal leader in agency environmental compliance and protection.”³⁷²

As promising as this type of rhetoric was however, critics of DoD's environmental record in the late 1980's continued to berate DoD's position on overseas environmental protection. One issue confronting DoD was its failure to promulgate new environmental direction. At that time the two main directives in force, DoD Directive 5100.50 and 6050.7 had been issued in 1973 and 1979, respectively. Another, more troubling issue at that time, was the fact that DoD, despite its avowed commitment to environmental

³⁷⁰ *Id.*

³⁷¹ Interview with Col Deborah Suchinski, USAF, Deputy Legal Counsel, Office of the CJCS Legal Counsel, Pentagon, Washington D.C. (March 1997).

³⁷² Memo to Secretaries of the Military Departments from Richard Cheney, Secretary of Defense, Environmental Management Policy, 10 October 1989.

excellence, had repeatedly failed to establish a uniform set of environmental compliance standards for its overseas installations.³⁷³ It seemed clear that no recognition of DoD's "proposed" new approach to environmental protection would be given serious consideration until identifiable progress and modifications to the environmental program were made.

Arguably, since the early 1990's, this progress has been made.. These changes, positive in nature and scope, are resulting in dramatic day-to-day improvements in environmental protection overseas and have begun to be viewed as the "model" for other militaries around the world.³⁷⁴

A. DoD Directive 6050.16 (DoDD 4715.5)

By the end of 1991, DoD, under intense pressure from both Congress and environmental groups³⁷⁵ to finalize a comprehensive overseas environmental compliance policy, promulgated Directive 6050.16, *DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations*.³⁷⁶ In 1996, this directive was replaced by DoDD 4715.5, *Management of Environmental Compliance at Overseas*

³⁷³ Contrast this situation with the practice in the United States where the Defense Environmental Restoration Act (DERA), 10 U.S.C.A. §§2701-2707, is utilized to fund the CERCLA requirements to DoD military bases.

³⁷⁴ See note 255 *supra* for a discussion on the DoD Environmental Security Program and the effect it has had upon foreign military forces and their attitudinal change toward environmental protection.

³⁷⁵ See Wegman & Bailey, *supra* note 53 at 937.

*Installations*³⁷⁷ with a few minor changes to the original.

Directive 6050.16 created the first comprehensive process by which to determine environmental protection standards applicable to United States military bases overseas. According to the directive, its purpose was to implement “environmental guidance and standards to ensure environmental protection”³⁷⁸ during “the operations of the DoD components at installations and facilities outside the territory of the United States.”³⁷⁹ These standards, which are based on “generally accepted environmental standards” required at military bases within the continental United States,³⁸⁰ were to be published within a baseline guidance document,³⁸¹ which was called the Overseas Environmental Baseline Guidance Document, or OEBGD.³⁸²

B. The Overseas Environmental Baseline Guidance Document(OEBGD) and Final Governing Standards (FGS).

In late October 1992, DoD, in response to the congressional directive contained in

³⁷⁶ DoD Dir. 6050.16, *supra* note 62.

³⁷⁷ DoD Dir. 4715.5, *supra* note 62.

³⁷⁸ DoD Dir. 6050.16, *supra* note 62 at para A.1.

³⁷⁹ *Id.* at para B.2.

³⁸⁰ *Id.* at para C.1.

³⁸¹ *Id.*

³⁸² OEBGD, *supra* note 63.

the FY91 defense authorization bill,³⁸³ published the Overseas Environmental Baseline Guidance Document, a nineteen-chapter document designed “to provide specific criteria which established baseline guidance for environmental protection on DoD installations overseas.”³⁸⁴ The document is intended to be used by the executive agents (EAs) appointed for nations where significant DoD activities are located.³⁸⁵ In sum, this document provides EAs in foreign nations instructions on how to handle host nation environmental standards which “provide less protection to human health and the natural environment than the baseline guidance.”³⁸⁶

The OEBGD also discusses the strategy of the process and provides technical environmental criteria³⁸⁷ to be used by the EA as a baseline for the environmental standard development process.³⁸⁸ These criteria, which are based on “generally accepted environmental standards,”³⁸⁹ are to be used by EAs in developing “final governing

³⁸³ See Wegman & Bailey, *supra* note 53 at 938. The directive from Congress required DoD to develop a more coherent environmental policy for its overseas facilities. *Id.* at 936.

³⁸⁴ *Id.* at para. 1-1.

³⁸⁵ *Id.* at para. 1-2.

³⁸⁶ *Id.*

³⁸⁷ *Id.* (“Particular substantive provisions of the baseline guidance document that are used by the Executive Agent to develop final governing standards for a country.”) *Id.*

³⁸⁸ *Id.* at para. 1-3.

³⁸⁹ DoD Dir. 4715.5, *supra* note 62 at para. F. 2. a.

standards”(FGS)³⁹⁰ to be used by military units within a specified geographic area of responsibility.³⁹¹ As indicated, the OEBGD process is intended to be dynamic and used to assist DoD in attaining it’s goal of being on “. . . the forefront of environmental compliance and protection.”³⁹²

In determining FGS’s, the responsible EA evaluates both the baseline standards provided within the OEBGD as well as the applicable host-nation standards which are “adequately defined and generally in effect or enforced against host-government and private sector activities.”³⁹³ The EA uses the OEBGD to establish the FGS unless the OEBGD is inconsistent with host nation or applicable international agreements which, taken together or individually, provide more protection to human health and the environment.³⁹⁴ Thus, the standard most protective of the environment typically becomes the final governing standard.³⁹⁵

In the event, a nation’s individual environmental protection standards cannot be considered individually due to inclusion within a comprehensive regulatory scheme, the EA may make a comparison on a broader scope.³⁹⁶ In these situations, the EA determine

³⁹⁰ *Id.* at para F.3.c.

³⁹¹ OEBGD, *supra* note 63 at 1-3.

³⁹² *Id.* at para. 1-3.

³⁹³ DoD Dir. 4715.5, *supra* note 62 at para. F. 3.b.(2).

³⁹⁴ *Id.* at para F.3.c.(1).

³⁹⁵ *Id.*

³⁹⁶ *Id.* at para F.3.c.(2).

the threat to human health or the environment by observing how the overall regulatory scheme compares to the OEBGD guidance standard. Based on that conclusion, the directive authorizes the EA to base the FGS on the more protective requirements.³⁹⁷

When an EA determines the final governing standards, these criteria become the “sole compliance standards at [military] installations in foreign countries.”³⁹⁸ Once standards are set, the directive requires the DoD Component commander to ensure compliance requirements are met.³⁹⁹ In some cases, the isolated nature of a particular overseas military site precludes the publishing of FGS’s for that location. In that event, the installation commander and his environmental staff are responsible for ensuring that environmental protection standards meet the more protective criteria of either the OEBGD, applicable host nation environmental standards, or environmental considerations found in international agreements.⁴⁰⁰ Conversely, a commander may not adopt environmental standards more restrictive than those outlined in the FGS unless agreed to by the EA.⁴⁰¹

The development of the OEBGD incorporated applicable portions of DoD directives and considered U.S. environmental laws to include: SDWA,⁴⁰² TSCA,⁴⁰³

³⁹⁷ *Id.*

³⁹⁸ *Id.* at para E.3.a and F.3.e.

³⁹⁹ *Id.* at para B.1.b. and E.3.a.

⁴⁰⁰ *Id.* at para F.3.h.

⁴⁰¹ OEBGD, *supra*, note 63 at pp. 1-7 *Implementation*

⁴⁰² Safe Drinking Water Act, (SDWA) 42 U.S.C. §§ 300f to 300j-26 (1996).

RCRA,⁴⁰⁴ CWA,⁴⁰⁵ CAA,⁴⁰⁶ and ESA⁴⁰⁷ among others.⁴⁰⁸ As extensive as it is, however, the OEBGD is not intended to be a compilation of all U.S. laws and regulations.⁴⁰⁹ Instead the guidance is intended to provide a baseline, a minimum standard of environmental protection to be observed at installations and facilities overseas.⁴¹⁰

The OEBGD and FGS contain standards for the following areas: air emissions; drinking water; wastewater; hazardous materials; solid and hazardous waste; medical waste management; petroleum, oil, and lubricants; noise; pesticides; historic and cultural resources; endangered species and natural resources; polychlorinated biphenyls; asbestos; radon; EIS, environmental effects abroad of major federal actions; spill prevention and response planning; and underground storage tanks, among others.⁴¹¹

However, the OEBGD and final governing standards do not apply to military

⁴⁰³ Toxic Substances Control Act, (TSCA) 15 U.S.C. §§ 2601-2692

⁴⁰⁴ Resource Conservation and Recovery Act, §§ 6901 to 6992k (1994) [hereinafter RCRA].

⁴⁰⁵ CWA, *supra* note 85.

⁴⁰⁶ CAA, *supra* note 84.

⁴⁰⁷ The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1996)[hereinafter ESA].

⁴⁰⁸ OEBGD, *supra*, note 65 at para. 1-4.

⁴⁰⁹ See generally discussion, Phelps, *supra* note 166 at 67.

⁴¹⁰ *Id.*

⁴¹¹ OEBGD, *supra*, note 65 at chts 2-19.

aircraft, the operation of naval vessels,⁴¹² operational deployments,⁴¹³ cleanup or remedial actions, or NEPA.⁴¹⁴ Once published, DoD components in a foreign nation must comply with the final governing standards established for that country.⁴¹⁵ In order to ensure that FGS standards are maintained, and that compliance is being enforced, DoD requires military units to perform periodic environmental compliance audits at every installation.⁴¹⁶ Each of the services performs this valuable inspection through the use of its own inspection system: the Air Force's E-CAMP;⁴¹⁷ the Army's ECAS,⁴¹⁸ and the Navy's ECE.⁴¹⁹ In the Air Force, failure to conform to FGS criteria are listed as "findings" in the audit and must be reported to the installation commander for resolution and correction.⁴²⁰

These FGS self-audits are vital to the DoD environmental protection program for two reasons. First, and a practical consideration in these days of budgetary constraints,

⁴¹² *Id.* para. 1-1.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ DoD Dir. 4715.5, *supra*, note 335 at para. 3.e.

⁴¹⁶ *Id.* at para E.3.d.

⁴¹⁷ AFI 32-7045, *Environmental Compliance Assessment and Management Program* (5 April 1994).

⁴¹⁸ AR 200-1, *Environmental Protection and Enhancement* (6 May 1996).

⁴¹⁹ OPNAVINST 5090.1B, *Environmental and Natural Resources Program Manual* (1 November 1994).

⁴²⁰ AFI-32 7045, Supplement 1. "Findings" are broken down into four main categories: Significant, Major, Minor, and Good Management Practices. *Id.*

employing the audit as a “self-policing” procedure designed to identify environmental program noncompliance areas is economically beneficial because deficiencies are generally less costly to correct than if first identified by regulators.⁴²¹ Second, these audits increase the general awareness and education of DoD personnel to the responsibility of environmental protection and are used to identify problem areas, practices, and additional planning areas that will require future DoD budgeting outlays.⁴²²

Based on the guidance contained within both Directive 4715.5 and the OEBGD, the importance of the role of the EA cannot be overstated. The EA is the ultimate “regulatory” authority for DoD components, installations, and facilities in the host nation.⁴²³ The EA is responsible for publishing initial FGS standards and criteria, revalidating the FGS annually,⁴²⁴ updating the FGS, generally every two years,⁴²⁵ and providing advice to commanders and their staff on environmental issues as necessary.⁴²⁶

C. DoD Directives 4715.1

Finally, as noted *supra*, in order to update and modernize its position on overseas

⁴²¹ Interview with Lt Col Marc Trost, Chief of Air Force Environmental Restoration Branch, Air Force Legal Services Agency Environmental Law and Litigation Division,(September 1997).

⁴²² *Id.*

⁴²³ See detailed discussion, Phelps, *supra* note 166 at 67.

⁴²⁴ *Id.* at 68.

⁴²⁵ *Id.* (“the need to update the FGS may result from significant changes in either the OEBGD or host-nation law changes.”) *Id.*

⁴²⁶ *Id.*

environmental protection, DoD recognized the need to replace the outdated DoD Directive 5100.50, “*Protection and Enhancement of Environmental Quality*”⁴²⁷ which historically gave little attention or direction to commanders attempting to protect the environment of overseas military installations. In order to proceed with its environmental commitment, DoD implemented Directive 4715.1,⁴²⁸ “*Environmental Security*” to replace 5100.50.

The new directive⁴²⁹ applies to world-wide military operations,⁴³⁰ and establishes policy for environmental security⁴³¹ within DoD. The directive declares as one of its goals: “to display environmental security leadership within DoD activities worldwide and support the national defense mission” by “ensuring that environmental factors are integrated into the DoD decision-making processes that may have an impact

⁴²⁷ Under this directive United States military forces overseas were required to conform to either the environmental quality standards of the host nation, international agreements, or applicable Status of Forces Agreements.

⁴²⁸ DoD Dir. 4715.1, *Environmental Security*, (24 February 1996)

⁴²⁹ The term “environmental security” is credited to Mr. Gary Vest, Principle Assistant Deputy Undersecretary of Defense (Environmental Security). According to Mr. Vest, the principle is intended to “strengthen national security by integrating environmental, safety and health considerations into defense policies.” Address by Mr. Gary Vest entitled Environmental Security, Joint Environmental Conference, Washington D.C. (27 September 1994).

⁴³⁰ DoD Dir. 4715.1, *supra* note 428 at para. B. 2.

⁴³¹ The directive defines Environmental Security as a program to enhance readiness by institutionalizing DoD’s environmental, safety, and occupational health awareness, making it an integral part of the Department’s daily activities. It is comprised of restoration, compliance, conservation, pollution prevention, safety, occupational health, explosive safety, fire and emergency services, environmental security technology, and international activities.

on the environment⁴³² and are given appropriate consideration along with other relevant factors.”⁴³³

The directive lists fourteen goals to achieve environmental leadership ranging from protection and preservation of the quality of the environment; reducing risk to human health and the environment by remediating contamination resulting from past DoD activities; minimizing adverse environmental impacts; and supporting international activities,⁴³⁴ consistent with national security policy, related to environmental security programs.⁴³⁵

In reference to overseas activities, D 4715.1 requires DoD personnel to comply with FGS for the host nation, or in areas where no FGS has been issued, the criteria in the OEBGD.⁴³⁶ The directive also requires DoD to comply with applicable international agreements, SOFA’s, and DoD Directives, Instructions, and policies when responding to environmental contamination caused by DoD in areas outside the United States.⁴³⁷ Finally, the directive requires personnel to comply with all requirements for

⁴³² “Environment” is defined as “air, water, land, man-made structures, all organisms living therein, the interrelationships that exist among them, and archeological and cultural resources.”

⁴³³ DoD Dir. 4715.1, *supra*, note 428 at para. D. 1.

⁴³⁴ International environmental activities include bilateral or multilateral agreements, information exchanges, and cooperative agreements. *Id.* at Definitions (k).

⁴³⁵ *Id.* at para D.1-14.

⁴³⁶ *Id.* at para D.13. a.

⁴³⁷ *Id.* at para D.13. b.

environmental analysis of actions outside the United States established by applicable United States statutes, international agreements binding on the United States, Executive Orders, or DoD policies.⁴³⁸

VIII. SEEKING BALANCE: ENVIRONMENTAL PROTECTION AND MISSION ACCOMPLISHMENT

A. Recent DoD Environmental Case Studies

1. Operation Sea Signal

Whether PRD 23 has been “shelved” temporarily or permanently, it is interesting to note the effect a national debate on extending the extraterritorial application of NEPA can have on the DoD environmental decision-making process. In light of *Massey*, a conservative assessment of DoD’s overseas NEPA obligations could be summed up by stating that overseas military actions that do not result in an adverse environmental impact in the U.S. do not fall within the requirements of NEPA, however, the DoD activity must still comply with Executive Order 12,114 and DoD Directive 6050.7.

One example was Operation Sea Signal. On 20 August 1994, the United States Atlantic Command (USACOM) was tasked by the Chairman of the Joint Chiefs of Staff (CJCS), at the direction of the President, to modify Operation Sea Signal to immediately prepare and operate a Cuban and Haitian migrant holding camp at Naval Air Station Guantanamo, Cuba.⁴³⁹ Operation Sea Signal was an humanitarian mission designed to

⁴³⁸ *Id.* at para D.13. c.

⁴³⁹ Memorandum, Lieutenant General Walter Kross, Director Joint Staff, to The UnderSecretary of Defense for Technology for Acquisition and Technology (17 October 1994). (On file with the Office of the Chairman’s Legal Counsel, OCJCS, Washington D.C.) [hereinafter Memorandum].

intercept and detain the large numbers of individuals fleeing from turmoil and unrest in Haiti and Cuba in unsafe or overburdened boats. At the height of the “boatlift” Naval and Coast Guard units delivered an average of 1172 migrants a day over a 25-26 day period.⁴⁴⁰ At the peak of the internment, 14,156 Haitian and 30,831 Cuban migrants were at the camps.⁴⁴¹

There were no host nation requirements, base rights, SOFA or other international agreement or applicable U.S. legislation which directly applied to the operation.⁴⁴² Pursuant to the CJCS order, USACOM issued a message to the Commander-in-Chief Atlantic Fleet (CINCLANTFLT) and the Navy Installation Commander at Guantanamo Bay (COMNAVBASE GTMO) ordering them, per the requirements of Executive Order 12,114 and DoDD 6050.7, to conduct an environmental review (ER) on the issues surrounding the construction of the migrant camp.⁴⁴³ The message noted that due to the volatility of the situation and the need for the U.S. to act and react immediately to changing conditions, modifications on preparation and content of the ER were appropriate under EO 12,114, Section 2-5(b) and DoDD 6050.7, Encl. 2, para E. 6. A.⁴⁴⁴

⁴⁴⁰ Environmental Review Guantanamo NAS Migrant Camp, dated 12 October 1994, page 2. (On file with the Office of the Chairman’s Legal Counsel, OCJCS, Washington D.C.) [hereinafter Environmental Review].

⁴⁴¹ *Id.* at page 9.

⁴⁴² *Id.* at page 5.

⁴⁴³ Message from USACOM to CINCLANTFLT and COMNAVBASE GTMO, dated 12 September 1994. (On file with the Office of the Chairman’s Legal Counsel, Washington D.C.).

⁴⁴⁴ *Id.* at page 1.

Based on the urgency of the operation, USACOM limited the review to environmental issues associated with the actual and potential migrant camp operation. Specific issues addressed included solid waste disposal, sewage disposal practices, a survey on the presence of endangered species, and the least harmful location for construction should new camps be necessary.⁴⁴⁵

What is interesting about Operation Sea Signal is the manner in which the decision to conduct an ER was reached. The initial Navy opinion was to seek an E.O. 12,114 review exemption based on a determination that the migrant camp construction deserved a finding of no significant environmental impact⁴⁴⁶ (FONSI) on base. Although this approach may have been the way DoD might have handled a similar issue in the past, the presence of on-site environmental professionals quickly led to their assertion that, based on the facts, a FONSI determination was without merit.⁴⁴⁷ That opinion, as well as subsequent expansion of the camp and a clearing of undeveloped woods, made a FONSI recommendation politically and environmentally unattainable.⁴⁴⁸

It was decided that although several realistic E.O. 12,114 exemptions existed,⁴⁴⁹

⁴⁴⁵ *Id.* at page 2.

⁴⁴⁶ Actions not having a significant impact on the environment are exempt from the requirements of Executive Order 12,114, sec. 2-5(a)(i) and DoDD 6050.7, encl. 2, sec. C. 3. a.(1).

⁴⁴⁷ Statement of CMDR. D. Sheperd, Environmental Documentation Requirements at Guantanamo NAS Memorandum, dated 31 August 1994. (On file with the Office of the Chairman's Legal Counsel, OCJCS, Washington D.C.) [hereinafter Statement].

⁴⁴⁸ *Id.*

⁴⁴⁹ USACOM could have requested an exemption under either EO 12,114, section 2-

an ER was the most beneficial course of action to take⁴⁵⁰ even though it involved a greater outlay of scarce resources.⁴⁵¹ A decision to perform an ER was decided for three reasons: to minimize damage to the environment caused by the migrant camp operation, to deflect possible criticism that DoD had failed to consider the environmental impacts of its operation there, and to strengthen DoD's position in the then on-going PRD 23 discussion which favored a less administratively structured approach to proposed changes to the procedures for consideration of overseas environmental impacts of DoD actions.⁴⁵² This decision reflects a concern for the environment as well as a pragmatic approach to the realities of 1990's DoD operations.

The ER explored what were considered to be the three most important environmental issues: a concern for the habitat and possible effects upon it, solid waste generation and disposal issues, and health and sanitation matters.⁴⁵³ The review determined that large areas of the base were undeveloped and provided relatively undisturbed habitat for numerous tropical plants and animals, to include the cuban ground iguana, common hutia, two varieties of mangroves, several species of cactus, and

5(a)(iii), for actions being taken at the direction of the President or a Cabinet Officer or EO 12,114, Section 2-5(a)(vii), for actions based on the grounds of emergency or relief effort.

⁴⁵⁰ Under DoDD 6050.7, *supra* note 278 at encl. 2, sec. C.1.a.(2), See also Statement *supra* note 447.

⁴⁵¹ See Statement, *supra* note 447.

⁴⁵² *Id.*

⁴⁵³ See Environmental Review, *supra* note 440.

numerous migratory bird species. Siting decisions sought to avoid these areas.⁴⁵⁴

Solid wastes generated by the construction and operation of the camps was systematically collected and disposed of at the existing base landfill. The primary waste stream consisted of paper plates and packaging, styrofoam cups, and related substances.⁴⁵⁵ The amount of waste generated determined that a second disposal site would be needed and had already been identified and cleared. In the event the rate of accumulations started to exceed the capability of the landfill operations, short duration pit burning was to be considered.⁴⁵⁶

Hazardous wastes were deemed to be minimal and were handled in accordance with established base requirements. Sewage was collected in porta-johns and hauled to a sewage lagoon where chlorine and other disinfectants were added for health and safety reasons.⁴⁵⁷ The remaining solids were scheduled to be “land-farmed” by adding biodigesters or, in the alternative, recollecting the sewage and metering it through the sanitary sewer system for ocean discharge.⁴⁵⁸ Of particular concern was the presence of lead on the base, especially at the rifle range where pulverized lead could be found in the

⁴⁵⁴ *Id.* at page 4.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at page 5. A proposal to barge and dispose of the sewage at sea was considered and rejected due to the long permitting process necessary under the Marine Protection, Research, and Sanctuaries Act (MPRSA). 33 U.S.C. §§1401-1445.

berm and impact area.⁴⁵⁹ The review recommended that this area be excluded from the camp siting and, as an added precaution, groundwater not be used as a drinking water source.⁴⁶⁰

The review listed numerous mitigation measures, but noted that due to the emergent nature of the humanitarian operation, limited mitigation measures had actually been employed.⁴⁶¹ The review concluded that the base had undergone some environmental degradation, but that the best possible environmental decisions had been reached given the rapid, fluid nature of the mission.⁴⁶² The review also concluded that given the external nature of the driving factors there was no feasible alternative to the camp location.⁴⁶³

Based on the review, USACOM requested an exemption from 12,114

⁴⁵⁹ See Environmental Review, *supra* note 440 at page 5.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at page 7. Some measures completed included a San Diego Zoo team who visited the base to identify suitable relocation areas for the iguana population and to develop a short-term “coexistence” policy to restore any biological systems damaged by the humanitarian mission. In addition, JTF bivouacs were sited on all base athletic fields and golf course to take advantage of cleared areas, thus staving off land disturbing activities. Other proposed mitigation measures included placement of silt fences along newly cleared areas to restrict erosion, sedimentation and potential reef damage; restoration of ground cover along the shoreline by planting pitted bluestem or madio grasses as soon as possible to further stabilize the soil; and development of long-term restoration plans *Id.* at page 8.

⁴⁶² *Id.* at page 9.

⁴⁶³ *Id.*

documentation requirements for the on-going construction of the migrant camp.⁴⁶⁴ This request was approved by The Under Secretary of Defense for Acquisition and Technology (USDA&T) who declared that all national interest activities undertaken to execute the President's directive were exempt from the requirements of Executive Order 12,114 and DoD Directive 6050.7.⁴⁶⁵

In his letter, USDA&T declared that "it was DoD policy to consider pertinent environmental considerations when making decisions regarding DoD activities and operations world-wide."⁴⁶⁶ He also requested that "appropriate commands perform and document environmental analyses and mitigate negative impacts of this and similar actions abroad, to the extent practicable and consistent with national security requirements."⁴⁶⁷ He ended his letter by commanding USACOM for "considering environmental impacts and for performing the environmental review of the construction and operation of these vitally important migrant camps."⁴⁶⁸

⁴⁶⁴ See Memorandum, *supra* note 439.

⁴⁶⁵ Memorandum, Paul G. Kaminski, Under Secretary of Defense (A&T), to director, Joint Staff, subject: Exemption from Environmental Review Requirements for Cuban Migrant Holding Camps at Guantanamo, Cuba (5 December 1994). (On file with the Office of the Chairman's Legal Counsel, OCJCS, Washington D.C.).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

2. Operation Joint Endeavor

a. Background of DoD Involvement in Bosnia

As the world's last remaining superpower, the United States also has vital and vested, national security interests in Europe. As might be expected, the bitterly divisive and deadly civil war fought in the former Yugoslavia, now split into three factions,⁴⁶⁹ threatened to interfere with those interests. On December 5, 1995, NATO's Foreign and Defense Ministers jointly endorsed OPLAN 10405 ("Joint Endeavor") the military plan for the Implementation Force in Bosnia, (IFOR) which ultimately set the stage for the largest military operation in NATO history: to create a peace in the former Yugoslavia.⁴⁷⁰ The U. S., as a NATO charter member, agreed to provide approximately one-third of the force necessary to establish the IFOR in accordance with the Dayton Peace Accords.⁴⁷¹

On December 16, 1995, the North Atlantic Council approved deployment of the IFOR main force and General George Joulwan, USA, ordered NATO forces to deploy to Bosnia.⁴⁷² Upon arrival, the primary responsibility of this United Nations task force was to protect the force; execute transfer of the U.S. sector from the United Nations Protection

⁴⁶⁹ The nation is split into what is now known as Bosnia, Herzegovina, and Croatia.

⁴⁷⁰ See generally, NATO Involvement in Balkan Crisis Fact Sheet located on United States Department of State web site (visited Jul. 11, 1997)
<<http://www.state.gov/www/current/bosnian conflict chron.html>.>

⁴⁷¹ *Id.* IFOR's main body of almost 60,000 troops consisted of troops from all 16 NATO allies as well as troops from 16 other non-NATO countries, including Russia. This force was fully deployed by mid-February 1996.

⁴⁷² *Id.* at Chronology: Dayton Peace Agreement located on United States Department of State web site (visited Jul. 11, 1997) <<http://www.state.gov/www/current/bosnian conflict chron.html>.>

Force (UNPROFOR); establish Joint Military Commissions; establish a logistics network; and expand the destroyed Tuzsla airfield.⁴⁷³

b. DoD Environmental Considerations in Bosnia

Although the environmental policies reflected in both the OEBGD and FGS do not apply to operations such as Joint Endeavor,⁴⁷⁴ DoD still is responsible for ensuring that adequate steps are taken to guarantee that all necessary environmental actions and considerations required under either executive order, international agreement, or department directive have been satisfied.⁴⁷⁵ With as big an operation as Joint Endeavor, these requirements are normally included within a specific mission Operations Plan or OPLAN. In 1995, DoD prepared a mission OPLAN⁴⁷⁶ to detail United States involvement⁴⁷⁷ in Operation Joint Endeavor.

Within the OPLAN are included a number of annexes which detail and define particular DoD requirements and responsibilities for the deployment. One such section is an environmental annex which DoD now requires included within specific mission

⁴⁷³ *Id.*

⁴⁷⁴ OEBGD, *supra* note 63 at Preamble.

⁴⁷⁵ Exhibit 1 to Tab B to Appendix 5 to Annex D to USCINCEUR OPLAN 4243(U), *Environmental Assessments (U)* 2 Dec 1995 (EUCOM ENVIRONMENTAL ANNEX [hereinafter Environmental OPLAN Annex Exhibit 1]).

⁴⁷⁶ Tab B to Appendix 5 to Annex D to USCINCEUR OPLAN 4243(U), *Environmental Considerations and Services(U)* 2 Dec 1995 (EUCOM ENVIRONMENTAL ANNEX [hereinafter Environmental OPLAN Annex]).

⁴⁷⁷ This OPLAN governed the U.S. military delegation that was part of the NATO IFOR force deployed to Bosnia-Herzegovina in support of the Dayton Peace Accord.

plans.⁴⁷⁸ The purpose of such an annex is to stress consideration of environmental impacts and efforts to avoid or minimize environmental consequences during all aspects of the operation.⁴⁷⁹ Operation Joint Endeavor's annex incorporates environmental requirements found in Executive Order, policy directives and manuals, and Joint Staff publications.⁴⁸⁰ It was prepared by the U.S. Army European Command, (EUCOM) "to provide guidance to protect the health and welfare of U.S. personnel and the environment during the conduct of operations resulting from implementation of this plan."⁴⁸¹

Relatively speaking, the Joint Endeavor environmental annex is very detailed and covers the spectrum of possible environmental concerns. However, as one might expect of a military operation being conducted in the middle of a foreign battleground, the annex makes it perfectly clear that efforts to avoid or minimize adverse environmental impacts, however important, must be balanced against the requirements of force protection and military necessity for mission accomplishment.⁴⁸² For example, United States military personnel are responsible for properly disposing of their own wastes and must take

⁴⁷⁸ JCS Publication 4-04, *Joint Doctrine For Civil Engineering Support*, 22 Feb 1995.

⁴⁷⁹ Col. D. Carr, Considerations for the Development of a DoD Environmental Policy for Operations Other Than War, AEPI-IFP-197 (30 May 1997).

⁴⁸⁰ See Environmental OPLAN Annex, *supra* note 476.

⁴⁸¹ *Id.* at para 1.a.

⁴⁸² *Id.* at para 3.a.2. ([t]he annex requires the "best practice and feasible environmental engineering and sanitary practices for the protection of human health and the environment. . ." these standards are conditioned upon ". . .force protection and mission accomplishment.")

appropriate actions to ensure safe disposal.⁴⁸³ In that vein, while the annex preaches avoidance of actions inconsistent with this concept of proper waste disposal, it recognizes and allows dumping or abandonment of waste when justified under combat or other hostile conditions.⁴⁸⁴ Finally, the annex notes that existing security conditions, preparation time and access, constraints on force size and limited detailed knowledge of existing environmental conditions are limiting factors to the OPLAN.⁴⁸⁵

Critics may contend that these actions conflict with the environmental protections outlined in Executive Order or department directives. However, the Major Assumption section of the annex states that Executive Order 12,114 and DoD Directive 6050.7 do not apply to this operation.⁴⁸⁶ The reason for this assumption is simple. Executive Order 12,114 applies to “major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and otherwise involved in the action.”⁴⁸⁷ In regards to Directive 6050.7, “no action is required . . . with respect to federal actions that affect only the environment of participating or otherwise involved foreign nations. . . .”⁴⁸⁸

DoD’s position is that since Operation Joint Endeavor was a United Nations

⁴⁸³ *Id.* at para 3.a.4.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at para 1.c.

⁴⁸⁶ *Id.* at para 1.b.

⁴⁸⁷ Environmental OPLAN Annex Exhibit 1, *supra* note 475.

⁴⁸⁸ *Id.*

sanctioned, multi-nation peace enforcement operation involving the movement of a multi-national force led by NATO in support of the Dayton Peace Accords,⁴⁸⁹ all actions contemplated within the operation, which might impact the environment, were done with the consent, participation, and involvement of the foreign host potentially affected by the action. Therefore, as evidenced by the international agreement authorizing the IFOR actions,⁴⁹⁰ neither Executive Order 12,114 or DoDD 6050.7 are applicable. Nonetheless, DoD clearly states within the annex that, participating nation involvement aside, consideration of environmental impacts and efforts to minimize adverse impacts by U.S. military personnel are to be accomplished during all aspects of the operation.⁴⁹¹

In addition to outlining the Purpose, Major Assumptions and Concept of Operations, the annex lists the environmental protection responsibilities of the deployed on-scene commanders;⁴⁹² service components;⁴⁹³ and the Defense

⁴⁸⁹ See HQ USEUCOM ECLA 9 Feb 96 Memorandum to the Commander, Defense Reutilization Marketing Region-Europe on file at that office. [Hereinafter ECLA Memorandum].

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at para 3. a. 1.

⁴⁹² *Id.* at para 2. a-f. (These commanders include the USAREUR (Fwd)/COMNSE, COMNSE Chief Engineer, COMNSE Environmental Engineer, USAREUR (Fwd) COMNSE SJA, USAREUR (Fwd) COMNSE Surgeon, and USAREUR (Fwd) COMNSE Safety Officer.)

⁴⁹³ *Id.* at para 2. g. (Service Components are responsible for implementation and compliance of the environmental section of Annex D within each service and for developing supporting environmental annexes. They are also responsible for collecting, storing, and transporting unit-produced hazardous materials and wastes IAW component guidance.) *Id.*

Logistics Agency.⁴⁹⁴ The annex also carefully outlines the operational requirements for the following areas: Potable Water,⁴⁹⁵ Grey Water,⁴⁹⁶ Wastewater/Human Waste,⁴⁹⁷ Solid Waste,⁴⁹⁸ Infectious Medical Waste,⁴⁹⁹ Noninfectious Medical Wastes,⁵⁰⁰ Hazardous Materials,⁵⁰¹ Hazardous Wastes,⁵⁰² NBC Wastes,⁵⁰³ Natural Resources,⁵⁰⁴ and Historical

⁴⁹⁴ *Id.* at para 2. g. (DLA is responsible for receiving accountability and physical custody of excess hazardous materials and hazardous wastes and arranging for final disposal. DLA is also responsible for ensuring compliance with applicable international agreements in the transboundary shipment of these hazardous wastes. *See*, next section *infra*). *Id.*

⁴⁹⁵ *Id.* at para 3. c. 1. a-c. (DoD personnel are required by the OPLAN to protect water supply sources from contamination by suitable placement and construction of wells and surface treatment systems, and siting and maintenance of septic systems and on-site treatment units.) *Id.*

⁴⁹⁶ *Id.* at para 3. c. 2. (Mess, Bath, and Laundry operations) *Id.*

⁴⁹⁷ *Id.* at para 3. c. 3. (Sewage will be disposed of using existing sewage systems where possible. If such facilities have exceeded their capacity, are not functional, do not exist, or if the transport (via sewage trucks) to a suitable treatment system is not possible, human waste shall be disposed of according to field sanitation procedures.) *Id.*

⁴⁹⁸ *Id.* at para 3. c. 4. (Solid waste will be disposed of at existing landfills, using contracted assets, whenever feasible. Field locations will use open burning where use of host-nation landfills is not feasible.) *Id.*

⁴⁹⁹ *Id.* at para 3. c. 5. a-d. (The annex defines infectious medical waste as waste produced by medical and dental treatment facilities which is specifically managed because it has the potential for causing disease in man and may pose a risk to both individual or community health if not managed properly.) *Id.*

⁵⁰⁰ *Id.* at para 3. c. 6. a-b. (The annex defines non-infectious medical waste as waste created in medical and dental treatment facilities that does not require special management because it has been determined to be incapable of causing disease in man or which has been treated to render it non-infectious. Noninfectious medical waste shall be disposed of as a solid waste) *Id.*

⁵⁰¹ *Id.* at para 3. c. 7. a-e. (The annex defines a hazardous material as any material that, based on either chemical or physical characteristics, is capable of posing an

and Cultural Resources.⁵⁰⁵

Under the annex, units must appoint an environmental compliance officer who will ensure unit compliance with the OPLAN environmental requirements.⁵⁰⁶ This person carries out his/her duties by conducting regular assessments of activities which pose a potential for environmental problems (e.g., vehicle maintenance areas, POL and hazardous waste storage areas).⁵⁰⁷ Any adverse or significant findings discovered must be forwarded within 24 hours to the USAREUR (Fwd) COMNSE Environmental Engineer who has been delegated “executive agent” status.⁵⁰⁸ As the person principally responsible for ensuring compliance with the environmental annex, the COMNSE Environmental Engineer is also responsible for “developing more detailed environmental

unreasonable risk to health, safety, or the environment if improperly handled, stored, issued, transported, labeled, or disposed of.) *Id.*

⁵⁰² *Id.* at para 3. c. 6. a-e. (The annex defines a hazardous waste as any discarded material that may be a solid, semi-solid, liquid, or contained gas that exhibits a characteristic of a hazardous waste (e.g., ignitability, corrosivity, reactivity, or toxicity) which has the potential to be harmful to human health or the environment, due to its quantity, concentration, chemical or physical characteristics.) *Id.*

⁵⁰³ *Id.* at para 3. c. 9.

⁵⁰⁴ *Id.* at para 3. c. 10. (Commanders are to consider protection of natural resources, to include all plants and animals, and in particular, any endangered or threatened species and avoid or minimize adverse impacts.) *Id.*

⁵⁰⁵ *Id.* at para 3. c. 11.

⁵⁰⁶ *Id.* at para 3. c. 12.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at para 2. c.

services guidance and standards,"⁵⁰⁹ as may be deemed necessary depending on the situation.

While the potential inadequacies of the OPLAN Annex exist, the plans and procedures contained within it have resulted in more efficient management of wastes generated by U.S. military members and has greatly increased the awareness of DoD's responsibility to protect the environment.⁵¹⁰ However, certain problems concerning the disposal of waste from U.S. troops overseas continue and threatens to disrupt the overall environmental success rate DoD has achieved in Bosnia-Herzegovina.⁵¹¹

c. Basel Convention on Transboundary Shipments

As might be expected, United States military forces generate a great quantity of hazardous waste during the course of normal military operations.⁵¹² These full tempo operations have traditionally resulted in waste products ranging from routine household waste to oils, solvents and petroleum-based products used primarily to clean aircraft parts and tools. Operation Joint Endeavor has been no exception. Realizing the potential scope of the waste disposal problem in a nation decimated by civil war, DoD contracted

⁵⁰⁹ *Id.*

⁵¹⁰ See, generally W. McDavit, S. Fukumoto and J. Wickemeyer, *Hazardous Waste Disposal In Operation Joint Endeavor: Hungary, Croatia, Bosnia-Herzegovina*, 1997 DoD Hazardous Materials and Waste Management Conference, 27 January 1997 Portland, Oregon.

⁵¹¹ *Id.*

⁵¹² *Id.* (As of 31 December 1996 the total quantity of wastes produced during Operation Joint Endeavor totaled 1,817,000 KG. This waste ranged from 100 kg of disposed ink cartridges to 457,262 kg of used lead acid batteries.).

with the Defense Logistics Agency (DLA) to arrange for the proper management and disposal of the hazardous wastes⁵¹³ resulting from U.S. IFOR operations and activities.⁵¹⁴ DLA, acting as DoD's agent in this matter, is required to comply with the disposal requirements of either the host nation law or applicable international agreements. After studying the possibilities for safe waste disposal in Bosnia-Herzegovina, DLA's approach, consistent with DoD's emphasis on environmental leadership, was to develop a treatment-based approach for setting the recovery/disposal standards for each anticipated waste stream for the area of responsibility (AOR).⁵¹⁵

Normally, at established military bases around the world, either DoD or the host nation has the waste disposal facilities necessary to properly dispose of waste generated. However in operational deployments adequate hazardous waste disposal facilities may not exist within the occupied territory. During Operation Joint Endeavor it was discovered that while hazardous waste disposal facilities in Hungary, a staging area for IFOR forces considered to be within the AOR, were suitable for managing and disposing of DoD waste, the same could not be said for the waste disposal facilities in Croatia and Bosnia-Herzegovina.⁵¹⁶ In those areas, DoD was forced to determine the type and amount

⁵¹³ The term "hazardous waste" refers to wastes not only regulated as hazardous wastes under U.S. laws, but also many "special" wastes, such as oil-contaminated solids, spent dry-cell batteries, used antifreeze, etc. *Id.* at page 3.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at page 5.

⁵¹⁶ *Id.* at page 8.

of waste that would be feasible and environmentally safe to dispose of in-country.⁵¹⁷ In an effort to provide some economic relief to the stricken region, DoD decided to process certain less hazardous BTU-rich wastes in Bosnia-Herzegovina such as used petroleum products and non-halogenated solvents which were burned at an energy recovery plant near Tuzla, Bosnia-Herzegovina.⁵¹⁸ Lead acid batteries were processed at a lead recycling facility in Slovenia.⁵¹⁹ The recovered usable product from the wastes were used to rehabilitate the local economies in parts of Bosnia-Herzegovina.⁵²⁰

In the case of other hazardous wastes however, DoD quickly deemed it unsafe and unrealistic to dispose of the waste in-country.⁵²¹ Due to the unsafe facilities and the lack of industry infrastructure necessary to dispose of the generated hazardous waste, DoD determined that much of the waste would have to be transported to other countries outside the AOR to guarantee that these wastes were disposed of in a safe and environmentally sound manner.⁵²² As practical as this action may seem, some viewed it as a violation of

⁵¹⁷ In-county is used to refer to any activity conducted within Bosnia-Herzegovina.

⁵¹⁸ *Id.* at page 11.

⁵¹⁹ *Id.*

⁵²⁰ *Id.* In an effort to encourage the concept of “Nation Building” in the former republics of Yugoslavia, DLA decided to allow some less hazardous waste streams to be managed in Bosnia-Herzegovina. This act was intended to play a small role in helping to re-build the nation’s infrastructure, such as the power utility, and contribute to other efforts to revitalize the industrial sector. *Id.*

⁵²¹ *Id.* at page 12.

⁵²² *Id.*

the Basel Convention.⁵²³

The Basel Convention sets forth the basic procedures and conditions for the transboundary shipment and disposal of hazardous wastes. The thrust of the Convention is to dispose of waste in the nation in which it was generated in order to improve and achieve environmentally sound waste management practices.⁵²⁴ The Convention signatories believe that the transport of hazardous waste risks serious harm to human health and the environment. In an effort to alleviate this risk, the Convention seeks to limit the transboundary shipment of waste.⁵²⁵ The Convention defines "transboundary movement" as :

[A]ny movement of hazardous waste or the wastes from an area under the national jurisdiction of one state to or through an area under the national jurisdiction of another state, or to or through an area not under the jurisdiction of any state, provided at least two nations are involved in the movement.⁵²⁶

The Convention does allow, under limited circumstances, nations to send or receive hazardous waste for disposal from other signatory nations contingent upon proper notification and approval of the parties involved, but this provision excludes the import or export of any hazardous waste from non-signatory

⁵²³ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (entered into force 5 May 1994, amended 22 September 1995.) (Hereinafter the Convention).

⁵²⁴ *Id.* at Preamble. See also generally Phelps, *supra* note 167 at 72.

⁵²⁵ *Id.* at Art. 2, para. 8.

⁵²⁶ *Id.* at Art. 2, para. 3.

nations,⁵²⁷ unless these actions are taken as a result of existing “bilateral, multilateral, or regional agreements or arrangements”⁵²⁸ which are consistent with and “do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention.”⁵²⁹

As of January 1997, 108 nations have ratified the Convention. Although the United States signed the Convention on March 22, 1989, it has not yet been ratified due to a Senate failure to pass required implementing legislation.⁵³⁰ Nonetheless, as an original signatory, the U.S. is obligated to refrain from taking any actions concerning waste disposal and its transboundary shipment that would violate the terms of the Convention.

DoD, realizing that there were no bilateral agreements on hazardous waste disposal negotiated between Bosnia-Herzegovina and any other neighboring country, recognized that negotiating such a bilateral agreement would take longer than IFOR was allowed to deploy in-country. DoD, therefore, took the position that the shipment of hazardous waste generated by a DoD installation or overseas facility, especially when achieved aboard sovereign American ships, was excluded from the Convention requirements.⁵³¹

⁵²⁷ See Phelps, *supra* note 167 at 72 citing to Art. 4, para. 5.

⁵²⁸ *Id.* at Art. 11, para 1.

⁵²⁹ *Id.*

⁵³⁰ 61 Fed. Reg. 8323 (1996).

⁵³¹ Agreed Text, *Applicability of the Basel Convention to U.S. Military Facilities*

DoD also argued that in accordance with Article 11 of the Convention, the various SOFA agreements, which were presently in place and allowed for the overseas transboundary shipment of hazardous wastes, were consistent with the “agreements or arrangements” language found in the Convention agreement and therefore met, if not technically, at least the spirit of the Convention.⁵³² Despite its critics,⁵³³ DoD’s interpretation of the Convention requirements afforded it the ability to retrograde a significant amount of hazardous waste back to the United States⁵³⁴ thus allowing it the flexibility required to both protect the environment while still meeting its military responsibilities.

d. Application of Basel Convention in Operation Joint Endeavor

The Basel Convention does not specifically address whether its provisions governing waste shipment are applicable during periods of armed conflict or civil war. DoD has incorporated the spirit of the Convention’s position which

Overseas, undated (abt Spring, 1994), which represents the agreed position of representatives of DoD, each military department, Department of State, DLA, and EPA.

⁵³² See Phelps, *supra* note 167 at 73. See also Agreed Text, *supra* note 531 (to ensure that the waste disposal problem was resolved prior to deployment of forces, NATO negotiated SOFA Agreements and/or Transit Agreements with Austria, Bosnia-Herzegovina, Croatia, Czech Republic, Hungary, Slovakia, Slovenia, and Former Republic of Yugoslavia (FRY) to allow for the transboundary shipment of these wastes.) See detailed discussion *infra*.

⁵³³ See Phelps, *supra* note 167 at 73. (“The transport of DoD generated hazardous waste to another country for disposal clearly violates the Basel Convention.”) *Id.*

⁵³⁴ As late as 1991, DoD was sending approximately 3 million tons of its yearly overseas hazardous waste back to the United States. See, generally, Rodgers, *supra* note 188.

discourages transboundary shipment of hazardous waste in both its directives⁵³⁵ and OEBGD.⁵³⁶

However, as noted previously, the OEBGD did not apply to Operation Joint Endeavor. That fact notwithstanding,⁵³⁷ DoD made it clear that environmental standards were to be met during the operation. To facilitate this policy and in order to protect human health and the environment, DoD ensured that adequate disposal standards were set for the disposal of waste generated during the operation which respected both host nation law, if existing, and international laws on transporting waste out of country. Furthermore, the OPLAN Annex for Joint Endeavor also included restrictions on the disposal of hazardous waste generated during the deployment.⁵³⁸

B. Modification of DoDD 6050.7

The requirements of DoD Directive 6050.7 implementing Executive Order 12,114

⁵³⁵ See DoD Directive 4715.5, *supra*, note 64 at para F.4.a. (“. . .DoD Components shall not dispose of wastes in a foreign nation that are generated by DoD actions and that are considered hazardous under either U.S. law or applicable host nation standards, unless the disposal complies with either the OEBGD or FGS. . . and is in accordance with any applicable international agreement. Absent an applicable international agreement that grants disposal authority, explicit or implicit concurrence is required by the appropriate authorities of the nation where the disposal takes place.”)

⁵³⁶ See OEBGD, *supra*, note 63 at para 1-1.

⁵³⁷ See discussion, Section VII. B *supra*.

⁵³⁸ *Id.* at para. 3. c. 8. (c) and (d). (“Transboundary shipment [of hazardous waste] will comply with applicable international agreements”. . . “U.S. generated hazardous wastes will only be disposed of in a host nation if it can be determined that disposal will be conducted in an environmentally sound manner.”)

do not apply to United States military activities overseas if the foreign host nation is participating in the activity.⁵³⁹ This exclusion is controversial since in practice it results in most overseas military activities, which might cause an impact to the environment, being exempted from the environmental analysis requirements of the order.⁵⁴⁰

In response to recent criticisms to this exclusion, DoD is currently working on proposed changes to DoD 6050.7 to provide a “systematic approach for determining whether actions to be undertaken, controlled, or funded by a DoD Component may have a significant adverse effect on the natural and physical environment outside the United States and, if so, the environmental analysis, if any, that must be prepared and considered by DoD officials before they authorize or approve such actions.”⁵⁴¹ Like the original directive which required DoD to respect treaty obligations and the sovereignty of foreign nations,⁵⁴² the draft directive specifically does not apply when it would come directly in conflict with an applicable international agreement.⁵⁴³

The draft directive includes five primary types of environmental analyses:

⁵³⁹ *Id.* at encl. 2, Sec. B 1.a. (“. . . the requirements of this enclosure apply only to . . . major federal actions that significantly harm the environment of a foreign nation that is not involved in the action.”).

⁵⁴⁰ E.g., *See*, Whitaker, *supra* note 367 at 30 in which the author states that every single military action taken pursuant to Operations Desert Shield/Storm was exempted from the requirements of Executive Order 12,114.

⁵⁴¹ DoD Dir. 6050.7, *Analyzing Defense Actions With the Potential for Significant Environmental Impacts Outside the United States*, (Draft, 27 February 1997), para A.3.

⁵⁴² DoD Dir. 6050.7 *Environmental Effects Abroad of Major Department of Defense Actions* (31 Mar 1979), para D.3.

⁵⁴³ DoD Dir. 6050.7, Draft, *supra* note 541 at para B.4.

categorical exclusions,⁵⁴⁴ overseas environmental impact statements,(OEIS)⁵⁴⁵ overseas environmental assessments,(OEA)⁵⁴⁶ environmental studies,(ES)⁵⁴⁷ and environmental reviews.(ER)⁵⁴⁸

Perhaps most important, considering the criticism directed against the original directive, is the fact that the revised draft directive broadens the “participating nation” language to require DoD components , in some circumstances, to comply with the requirements for analysis regardless of whether the host nation is participating in the activity.⁵⁴⁹ Specifically, the draft directive requires DoD to prepare either an ES or an

⁵⁴⁴ The purpose of the categorical exclusion is to allow efficient, timely consideration of environmental factors for a proposed major DoD action by determining that it belongs to a previously identified class of major DoD actions that will not, individually or cumulatively, have significant, adverse impacts on the environment absent extraordinary conditions. *Id.* at para 5.a.

⁵⁴⁵ The purpose of the overseas environmental impact statement is to ensure environmental factors are considered along with other pertinent factors before a decision is made to proceed with a major DoD action outside the United States and outside the jurisdiction of any foreign nation.(global commons) *Id.* at para 6.a.

⁵⁴⁶ The purpose of the overseas environmental assessment is to determine whether an OEIS is necessary. This is achieved by determining whether the proposed action, taking into consideration any mitigation measures the proponent is prepared to undertake, will have significant, adverse impacts on the environment. *Id.* at para 6.b.

⁵⁴⁷ An environmental study is an analysis of the likely environmental effects of a major DoD action that could have significant, adverse effects on the environment of a foreign nation and is prepared by the United States in conjunction with one or more nations. *Id.* at para 7.a.

⁵⁴⁸ An environmental review is an analysis of the likely environmental effects of a major DoD action that could have significant, adverse effects on the environment of a foreign nation and is prepared solely by the United States. *Id.* at para 7.b.

⁵⁴⁹ *Id.* at para F.3.b.

ER, even if the host nation is participating in the activity, *if* DoD believes that the major action (emphasis added):

1. Will have a significant, adverse effect on the environment of a foreign nation;⁵⁵⁰
2. Will have significantly adverse effects on the environment of a foreign nation and will provide to that nation a closely regulated product or physical project;⁵⁵¹ or a nuclear production or utilization facility as defined in 42 U.S.C. 2014, *et seq.*, or a nuclear waste management facility;⁵⁵² or,
3. Will occur outside the United States and have significant adverse effects within a foreign nation, on natural or ecological resources of global importance designated for protection by the President under E.O. 12,114, or by the Secretary of State in the case of such a resource protected by international agreement binding upon the United States.⁵⁵³

In all other cases, DoD will be required to determine whether the participating nation is applying an environmental analysis regime⁵⁵⁴ to the major action. If such a regime is being applied, the DoD activity is to request, subject to national security or foreign policy concerns, a copy of the EA so that the U.S. activity can make an informed decision about its own participation in the action.⁵⁵⁵ If the participating host-nation is not

⁵⁵⁰ *Id.* at para F.7.c.1.

⁵⁵¹ A product or project that produces a principle product or an emission or effluent that would be prohibited or strictly regulated as a serious risk to human health under Federal law in the United States. *Id.* at encl.2, para 2.

⁵⁵² *Id.* at para F.7.c.2.

⁵⁵³ *Id.* at para F.7.c.3.

⁵⁵⁴ A formal process that, as provided by host nation law and implemented in practice, provides reasonable assurance that host nation decision-makers will be provided reasonably complete information on the environmental effects of major DoD actions in which the host nation is participating. *Id.* at encl.2, para 6.

⁵⁵⁵ *Id.* at para F.3.c.2.

applying an environmental regime to the major DoD action, the new directive requires DoD to offer to assist with the analysis, subject to United States national security or foreign policy concerns.⁵⁵⁶

Finally, recognizing the delicate foreign policy issues that exist for DoD forces overseas, the draft directive authorizes the DoD Component to decide whether to proceed with the proposed action even if the participating nation chooses not to provide the requested analysis or to jointly analyze the action. Prior to proceeding however, DoD must carefully consider the consequences of its action on the basis of information readily available and only after respecting any national security or foreign policy concerns.⁵⁵⁷

When effective, the new DoD Directive 6050.7 will be a better organized, more comprehensive document than Executive Order 12,114, and will have addressed the biggest loophole to effective environmental protection--the participating nation exclusion. This improved process continues the DoD effort to be environmentally responsible while striving to achieve its mission.

IX. CONCLUSION

It would be easy to say that DoD cannot be trusted to protect the environment based on its past environmental record.⁵⁵⁸ However, events over the past decade demonstrate that DoD fully understands and appreciates the synergy between

⁵⁵⁶ *Id.* at para F.3.c.3.

⁵⁵⁷ *Id.* at para F.3.c.4.

⁵⁵⁸ See discussion, Section II. B. *supra*.

environmental protection and mission success, in other words, that protection of the environment and success of the military mission are not exclusive. Recent regulatory and policy changes emphasize DoD's willingness to protect the environment, balanced against the needs of force protection and military necessity, during operations both within the United States and overseas.

Continually building upon this policy since the early 1990's, DoD has committed itself to being a leader in environmental security and has taken affirmative acts to ensure that this commitment is a long-lasting one. Executive Order 12,114, taken together with revised DoD directives, policies and regulations, provide a comprehensive determination of DoD overseas environmental procedures, and furthers those environmental objectives consistent with foreign and national security interests. DoD Directive 6050.7, the implementation of Executive Order 12,114 within the DoD, requires military decision-makers, from the MAJCOM to the installation level, to be informed of relevant environmental issues and to seriously consider those issues when planning military actions.

Sensitive to perceived loopholes, such as the "participating host-nation exception," and in hopes of heading off any PRD-23 type challenges to either NEPA or Executive Order 12,114, DoD is revising Directive 6050.7 to expand the environmental analysis requirement of the executive order to ensure that environmental actions are considered regardless of host nation involvement. This change will increase the number of actions that result in some type of environmental review and potentially will lead to increased DoD overseas environmental protection.

DoD is also mandating comprehensive decision-making by requiring environmental planning at established overseas facilities under Joint Publication, (Joint Pub 3-34) during the preparation of operations orders and contingency plans.⁵⁵⁹ Currently being developed, Joint Pub 3-34 will address a broader scope of environmental issues closely aligned with operations, such as operational movement, maneuver and force protection and environmental support.⁵⁶⁰ Other environmental issues to be addressed in Joint Pub 3-34 will include operational planning, environmental stewardship, environmental compliance, mitigation and restoration and waste disposal.⁵⁶¹ To further that end, DoD has approved a joint doctrine initiative to create a standardized environmental annex which expands upon the current Joint Pub 4-04 format. This new annex, “Annex L”, will be the template for all Joint OPLAN Environmental Annexes.⁵⁶² Annex L stresses consideration of environmental impacts and efforts to avoid or minimize adverse environmental consequences during all aspects of the operation, even those not included within Executive Order 12,114 or DoD guidance.

DoD’s use of directives such as 6050.7, 4715.1 and 4715.5, along with necessary exemptions they contain, provide DoD with the needed flexibility to accomplish the mission and appropriate guidance to protect the overseas environment. DoD has demonstrated that it intends to make these directives more comprehensive than the

⁵⁵⁹ See Carr, *supra* note 479 at 22.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

previous Executive Order guidance which should foster continued environmental awareness and increased protection to both humans and the environment.

By establishing a minimum standard of environmental compliance procedures through implementation of the OEBGD in 1992, DoD began, in earnest, the job of providing consistent agency direction to military members, civilian employees and defense contractors world-wide. Recently, DoD has been working to improve upon the guidelines used to establish final governing standards applicable to overseas locations. The trend continues to indicate that DoD will implement, some time in the future, a policy that requires executive agents to incorporate host nation environmental requirements into local FGS's, even in a nation such as Germany which has begun to set extremely stringent environmental standards. This policy should close any remaining loopholes in the OEBGD process and eliminate the potential for military environmental failures like those discovered by Congress in the early 1990's.

DoD has also demonstrated that it understands the sensitivities involved in forging environmental policies overseas. To that end, any proposed change to NEPA must fully explore the possible ramifications to foreign sovereignty and how any NEPA change would impact foreign policy and national security interests. It seems clear that attempting to implement NEPA on a global basis puts tremendous pressure on the general international law principles of respect for sovereign foreign nations. Unless, a sovereign is agreeable to extensive foreign intrusion and allows the U.S. to substitute its environmental policies in place of the foreign host nation regime, this idea will be

⁵⁶² *Id.*

difficult to put into practice.

Likewise, any proposal to amend NEPA must fully understand and appreciate the underlying tensions involved in this issue to include the developed v. undeveloped nation issue central to any intent to apply NEPA extraterritorially. While the idea of applying a broad, sweeping environmental statute, like NEPA, across the globe in an effort to solve all of the world's environmental problems sounds fiercely American, the reality is a little less grand. The United States must come to grips with the factors which influence environmental decision-making in poor, undeveloped nations. In my opinion, the only way to do this successfully is through international discourse and compromise.

Discussion and compromise aside, the real challenge is to craft consensus among nations that results in true global protection without the need for encroachment on a nation's sovereignty. This approach makes sense when looking at the recent track record of environmental successes world-wide and realizing that most of these successes have come when nations sit down and discuss ways to make consensual improvements to environmental matters.⁵⁶³ It is very unlikely, in this age of environmental awareness, that one nation would relinquish its voice in matters concerning environmental areas, or more importantly, the national interests inherent in those matters. The United States would not

⁵⁶³ See United Nations Conference on Environment & Development: Convention on Biological Diversity, 31 I.L.M. 818 (1992) (Art 3 states that nations have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”) *Id.* at 824. See also United Nations Conference on Environment & Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (Seeking to stabilize greenhouse gases “at a level that would prevent dangerous anthropogenic interference with the climate system.”) *Id.* at 854.

do it and it is paternalistic to think that poorer, less powerful nations will.

To be successful, nations must employ diplomacy, negotiation and international agreements, such as the Stockholm⁵⁶⁴ and Rio Declarations,⁵⁶⁵ to enforce environmental protection around the world. A nation that agrees to enforce environmental protection should not do so through an artificial mechanism, such as NEPA, but instead should follow its own stated principles and national interests expressed in an international agreement. This approach will strengthen international commitment to environmental protection while relieving the U.S. of the “role” of global environmental policeman.

Through both word and action, DoD clearly understands the changing dynamics of environmental awareness and protection and the unique role it plays in both. By acknowledging its past mistakes and aggressively targeting future improvements, DoD has demonstrated that it will not retreat on its commitment of being an environmental leader in the 21st century.

⁵⁶⁴ Stockholm Declaration of the U.N. Conference on Human Environment, U.N. DOC. A/CONF. 48/14/Rev. (1973).

⁵⁶⁵ Rio Declaration on Environment and Development, U.N. DOC A/CONF. 151/26 (1992). It is important to note that these Declarations are not treaties and do not, by themselves, create a legally binding contract or obligation, while still reflecting customary international law. See Gardner, *supra* note 248 at FN 180.